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ABSTRACT

This transcript includes witness statements on off-air taping for educational use from 20 individuals presenting the viewpoints of copyright proprietors, public broadcasters, educators, performing artists, and the U.S. Register of Copyrights. Appendices include lists of hearing and conference invitees and negotiating committee members, as well as relevant legal materials and additional statements from 25 media producers, administrators, and educators. (CMV)

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OFF-AIR TAPING FOR EDUCATIONAL USE

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

OFF-AIR TAPING FOR EDUCATIONAL USE

MARCH 2, 1979

Serial No. 6

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OFF-AIR TAPING FOR EDUCATIONAL USES

FRIDAY, MARCH 2, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:35 a.m. in room 2141 of the Rayburn House Office Building, Hon. Robert Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier and Moorhead.

Staff present: Bruce A. Lehman, counsel; Audrey Marcus, secretary; Robert Kurz, research associate; and Thomas E. Mooney, associate counsel.

Mr. LEHMAN. Could people take their seats, please, so we can get underway?

My name is Bruce Lehman, and I am the counsel for the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. And I would like to take this opportunity to welcome all of you who came from so long a distance this morning to participate in this hearing on the copyright problems associated with off-air videotaping of copyrighting works for educational purposes.

It is only fitting that the person who will open the program this morning and welcome you, setting the tone for it, is the chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, Hon. Bob Kastenmeier from Wisconsin.

And I am sure most of you are very familiar with Mr. Kastenmeier's work in the past, since his name appears on almost every legislative report during the history of the development of the Copyright Act of 1976, and probably more than any other legislator over the years has worked on copyright law. He can be said to be the father of that act.

One unresolved issue, of course, that has given us continuing problems is the off-air educational taping question, so it is only appropriate that we hear from Chairman Kastenmeier with a few remarks on that subject.

Mr. KASTENMEIER. Thank you, Mr. Lehman. I, too, would like to extend a welcome to you.

During the course of my career in Congress I guess few issues have consumed more of my personal attention over an extended period of time than copyright law.

This association with copyright issues goes back at least to 1962, when the subcommittee which I now chair took the first step—suspension of the expiration of subsisting terms—in what became a 15-year effort to revise the law. Of course, efforts to do so predate that period as well.

One of the most rewarding features of those 15 years was the cooperative nature of the revision effort. Of course, there were fierce struggles over particular issues. However, in the last analysis almost every affected group desired that the revision effort succeed, and contributed to that success, by modifying and compromising their initial positions.

This spirit of cooperation was expressed most visibly in efforts on the part of proprietors and users in working out a series of guidelines defining fair use in certain situations. Three sets of guidelines were ultimately agreed upon and were published as part of the official legislative history of the act.

These guidelines covered classroom copying of books and periodicals in nonprofit educational institutions, educational uses of music, and photocopying by libraries.

One area in which parties had been negotiating, but in which guidelines were not forthcoming, was off-the-air taping of copyrighted broadcast programs.

At the time we wrote the House Judiciary Committee report explaining our work, we simply expressed the belief that the fair-use doctrine had some application to off-air taping, took note of the unfinished state of the negotiations among the parties, and encouraged them to continue to attempt to resolve their differences under the leadership of the Register of Copyrights.

The Register has attempted to carry out that mandate. Her efforts were reflected in a conference held from July 19 through 22, 1977, at Airlie House in Virginia, in which a wide range of interested parties were brought together for a discussion of the issue. Over 1½ years have now passed since the Airlie House meeting, however, and no agreement has been reached.

In fact, it is my understanding that negotiations have broken down completely. Meanwhile, producers have begun to institute lawsuits against educators and in some cases have attempted to withhold product from the broadcast market. These developments are not consistent with congressional intent to write a law which will assure widespread dissemination of intellectual creations while assuring a fair reward for the authors of those creations.

Therefore, my colleague Congressman Tom Railsback and I, with the assistance of the Copyright Office, have convened this oversight hearing in an attempt to encourage affected parties to work out an agreement which will not require a full-scale reexamination of the issue by the Congress.

The program this morning and afternoon will be highly structured in an attempt to use our time as efficiently as possible. We will hear from representatives of 26 different groups, divided equally among proprietor and user interests. By the end of the day, I believe that we will have a complete picture of all aspects of educational off-the-air taping from a variety of perspectives.

We do not intend to solve the problem in this meeting alone. Rather, we intend to make a record in the presence of representatives of all affected parties which will serve as the basis for finding a nonlegislative solution as to what constitutes fair use for broadcast audiovisual works.

In advance of this meeting, we have consulted with various national organizations representing affected parties and contacted 15 individuals drawn from among educators, copyright owner interests, public broadcasting and artists' guilds, who have agreed to constitute a committee to develop guidelines on educational fair use of broadcast audiovisual works. These names will be announced later. [See appendix for membership.]

It is my hope that within a few months this ad hoc committee will be able to report back to my subcommittee with a set of guidelines which we will publish to supplement the existing fair use of guidelines contained in the 1976 legislative reports.

Therefore, on behalf of Chairman Peter Rodino and the entire committee, I would like to extend a warm welcome to you to these historic Judiciary Committee chambers.

There may be others among my subcommittee who will during the course of the day be joining us.

The other members of the subcommittee are well aware of this undertaking today and informed of it and join with me in extending to you good luck. Thank you.

Mr. LEHMAN. Thank you, Chairman Kastenmeier.

The other member of the House of Representatives who is equally associated with the copyright revision effort is the Honorable Tom Railsback, from Illinois, who is the ranking Republican member of the subcommittee, and since today is not a business day in the House of Representatives, Mr. Railsback had other commitments in Illinois and he is not here this morning.

But in many ways we have something almost as good, and that is Tom Mooney, who is the minority counsel of the subcommittee, who has been around longer than, I think, Congressman Railsback on the issue of copyright. So maybe he is even a better person to welcome you on behalf of Congressman Railsback and the minority members of the subcommittee.

Mr. MOONEY. Thank you, Bruce. Chairman Kastenmeier and distinguished guests, you will be pleased to know that I do not have any prepared remarks for this morning. When we learned yesterday that Congressman Railsback would be unable to attend, Bruce called me over to his office and said that he thought that I might be able to make a contribution.

And he suggested possibly three areas. Not knowing how a meeting of this type may develop or turn out, Bruce suggested that I might want to be an official referee of sorts, and he then suggested that maybe I might be a sergeant-at-arms to retrieve people who may storm out or whatnot. But his third suggestion is what I like the most.

He suggested that maybe I should be the man in charge of the gong, and if things got a little out of hand, I would leap from the dias and head back to the back and grab the gong and hit something that would make some noise.

In any case, this conference may be called Airlie House I, Revisited. This is an area which I am afraid we are going to have to revisit and revisit, and then revisit again, until hopefully a solution of sorts emerges.

I don't think anyone here in this room this morning believes that it is going to be solved this morning or this afternoon, but especially for those of you who attended the Airlie House conference of July 1977, you may be a little bit skeptical. But I think when you look around and see how many people have turned out and the interest, I think one thing we can say very positively is that the door seemingly is still open.

But it is also important that, after a reasonable time and a herculean effort by the parties involved, that we may have to come to the realization—and I think it is important for Chairman Kastenmeier to be made aware of that too—that the parties cannot come to an agreement. But hopefully that will not be the case.

And I think with all of us here today the purpose is to make every effort possible. And with your permission, I would just like to read a brief letter that was sent to our chairman by Congressman Railsback, and it says:

> DEAR BOB: Due to commitments in my district, I will be unable to attend the copyright meeting of March 2. I would like to commend you on your efforts in bringing the interested parties together on this most difficult and controversial issue. Off-air taping for educational purposes is an issue that affects millions of people and billions of dollars, and it is an issue that must be brought to a resolution either through the efforts of the parties that are being assembled on Friday or through legislation. It is an issue that is not partisan.
>
> As you know, you have my full support and backing in your efforts to try and bring the parties together. If the parties are unable to come to a satisfactory solution of this matter, I am willing to support legislation that will resolve this issue.
>
> Warm regards,
>
> TOM RAILSBACK.

Thank you.

Mr. LEHMAN. Thank you very much, Tom.

We heard from the Democrats and the Republicans, and now the Copyright Office. Perhaps now that my boss has left the room, I can say that we are saving the best for the end. We will be hearing from Barbara Ringer at the closing of today's meeting.

But to acquaint you a little bit with the Copyright Office and some of the program details of this morning, I will turn the podium over briefly to Ivan Bender, who has done a lot of the work, as many of you know, in helping the subcommittee put together the program this morning.

Just before I turn the program over, I would just like briefly to mention a little bit about the nature of the program to followup on what Chairman Kastenmeier said. This is a very highly structured meeting, because we have a limited amount of time, and we need to get everybody's point of view on the record in that limited period of time.

We are taking an official transcript of the meeting this morning, and it will be published and made available to everyone who is here and also to those who will be working on this problem in the future.

That record will be open for additional comments, so that if anybody, for a period of 2 weeks subsequent to this meeting, wants to submit written statements, comments appropriate to this issue we will be happy to accept them, and they will all be bound together in one volume and will serve as a very excellent working document for dealing with this problem in the future.

There probably will not be a lot of time for open general discussion. We will see how it goes. If at the end of the day we have been moving along fairly rapidly, then we might be able to get into a little bit of discussion of the issue.

We don't want to be authoritarian about that, but in order to make sure everybody is treated fairly, we have to have a very structured program.

But if we do get into discussion, I would like you to be thinking of comments you would like to make and commit them to a piece of paper, just a few sentences about what you would like to bring up.

Mrs. Marcus over here on the side of the room will be happy to take those from you, and then we can take a look at them, and, if we have time, select the ones that are representative, and that will constitute our closing discussion.

So with that I would like to recognize Ivan Bender. Then we will get into the meat of the program.

Mr. BENDER. Bruce said I will welcome you briefly, and Bruce doesn't know me very well, but I will be brief, I promise you, this time.

On behalf of the Copyright Office, Library of Congress, Barbara Ringer, Register of Copyrights, Jon Baumgarten, General Counsel of Copyright, I want to welcome all of you to this conference.

I look out on a sea of friendly faces. It reminds me that to some extent it is a reunion of Airlie House.

Airlie House has been mentioned this morning on several occasions. All the prior speakers have talked about it, made reference to it, and I think that the principles that were discussed at Airlie House are still valid today, in spite of the fact that the problem is still unresolved.

Hopefully, therefore, the Airlie House conference can more or less serve as a jumping off point rather than beginning, as we did at Airlie, to define and otherwise try to determine what the principal issues are.

We know that the problem is complex, and we know that it is not going to be easy to solve. A lot of things in life are not easy to solve, but that doesn't mean that you give up. And as a matter of fact, I am reminded that earlier this morning a major political upset occurred in Chicago, and everybody said that would probably never happen.

So perhaps with that as a somewhat recent precedent, we can say, as difficult as this problem is to resolve, it can be done.

As Bruce mentioned, the agenda is a fairly tight one, and many of you that I spoke to are well aware of that. You pretty much know what your time frames are, and we hope that we can stick to that as much as possible, so that we can indeed leave some time at the end of the program for comments or questions from the audience.

One other thing that I would like to mention to you, some people during the course of establishing the agenda asked if written statements would be appropriate or indeed necessary. We have not asked the presenters to provide us with written statements. However, if any of the presenters or anyone else that represents themselves or constituencies would like to provide a written statement for the record, please do so.

Some of the other mechanics, we will discuss as the day goes on. We will have a break following our next presentation. And with that, I will turn the microphone over to Bruce to introduce Professor Latman

Mr. **Lehman**. One of the things that we decided was essential to this program, after talking to a lot of people about their perceptions of the issue over a period of time, was to begin it with a scholarly, but hopefully not deadly boring, presentation of the history of the problem by a person who is impartial and who has a good reputation in the field and can set good tone for future discussions in the meeting.

Looking around the country, the person who Chairman Kastenmeier thought would be the best for that purpose is Prof. Alan Latman of New York University Law School. Professor Latman is rapidly, I think, becoming recognized as one of the leading scholarly experts in copyright law. He is the head of the Copyright Center at the Law Center at the New York University Law School.

Of course, New York is the center of a lot of industries associated with copyright law. In addition, Professor Latman is the executive director of the Copyright Society of the United States, which is a professional copyright association, that I know many of you who are lawyers belong to and perhaps some of the nonlawyers too, actually.

I have heard Professor Latman speak many times, and I hope that he will be able to at least warm up the meeting this morning and set the proper tone.

So with that I would like to turn this meeting over to Alan Latman.

TESTIMONY OF PROF. ALAN LATMAN, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Mr. **Latman**. In a simpler time, what my children like to call olden days—namely, 1958—a simple-minded scholar[1] offered a simple-minded question that could be trotted out whenever we talked about fair use; in other words, whenever it was claimed that a particular reproduction or performance of a copyrighted work constituted fair use rather than infringement, one could simply ask, "Would a reasonable copyright owner have consented to the use?"

It was added that at times public policy, custom, and a lot of other things determined what is reasonable. This suggestion which reduces all of those criteria that we have heard of to one single criterion is like one of my students. I suppose I am getting to appreciate my illustrious predecessor, Professor Derenberg, who could always recognize his students in any group. And I see one here today.

My student decided he wanted to reduce the entire course to one page, the essence. He did it. But it wasn't short enough. So he reduced it further to a paragraph, to a sentence, and finally the whole course to a single word. He walked into the exam. He forgot the word.

But the single question from the 1958 study does remind us of some of the theoretical bases of the fair use doctrine in copyright law. For example, one is implied consent. As part of the figurative legendary bargain with the author or copyright owner, where the owner is accorded and accepts a limited term of copyright, the theory is that he or she consents in advance to certain uses of the copyrighted work which might otherwise infringe.

The popular theoretical basis for fair use these days is the Constitution—namely, the constitutional power of Congress to "promote the progress of science," that is, knowledge, by providing a system of copyrights to private citizens.

---

[1] Latman, *Fair Use of Copyrighted Works*, 2 Studies on Copyright 15 (Arthur Fisher Mem. Ed. 1963).

So in one important case involving the right of a biographer of Howard Hughes to copy from a magazine series which had been one of the few articles dealing with Hughes, the court said, "The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance." [2]

I wish I had time to go into the question of whether the Constitution really answers the controversies that come up. For example, the sentence I just quoted you from the Howard Hughes case is followed by another sentence from an even more colorful case, which we call the "Mad Comics Case," [3] which says, "To serve that purpose [that is, the constitutional purpose] courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry."

I am sure that sentence rings pleasantly in the ears of those among you who consider yourselves part of the user groups. User groups very often quote another maximum: "The copyright law like the patent statutes makes reward to the owner a secondary consideration." [4]

But when the Supreme Court quoted this maxim in the *Mazer* v. *Stein* case,[5] it immediately noted that the law is, nevertheless, intended to grant valuable enforceable rights to authors, publishers, et cetera, because: "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors."

Without burdening you with too many quotations, I do want to add a pertinent comment made by this committee, the House Judiciary Committee in its 1967 report on this very subject:

> The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that a potential destruction of incentives to authorship presents a serious danger.[6]

Maybe this whole question of the constitutional controversy is overrated. After all, James Madison didn't have any trouble with it. He probably drafted the clause. And in the "Federalist Papers" he said that, "The public good fully coincides with the claims of individuals with regard to patent and copyrights." [7] So maybe the problem is easy.

Against this background, of course, the courts developed the equitable rule of reason called "fair use." It arises in a few characteristic settings. But in my view its development has also included a very significant shift since the olden days of 1958. I would like to describe these settings and talk about the shift, but first I suppose I must walk through the statute with gun and camera, as they say, to note the provisions bearing most closely on off-the-air taping by schools.

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[2] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 150 USPQ 715 (2d Cir. 1966), cert. denied, 385 U.S. 1009, 152 USPQ 844 (1967).

[3] *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541, 141 USPQ 1 (2d Cir.), cert. denied. 379 U.S. 822, 143 USPQ 464 (1964).

[4] *U.S.* v *Paramount Pictures*, 334 U.S. 131, 158 (1948).

[5] 347 U.S. 201. 100 USPQ 325 (1954).

[6] H. Rept. No. 83, 90th Congress, 1st session 31 (1967).

[7] "The Federalist," No. 43 at 279 (modern library edition, 1941).

Some of the things I am about to say will necessarily reflect interpretations about ambiguous developments. And so here is a quick disclaimer. I personally have through the years been involved in some reported lawsuits and many unreported counselings to clients on all sorts and on various sides of questions of fair use. I hope only one side at a time, but nevertheless, in the aggregate on all sides, and some pretty close to the subject that we are talking about today. Needless to say, I speak only for myself.

What are the statutory provisions? First, to begin with and only to begin with is, of course, the group of sections that grant rights and define infringement. Section 106 is the source of the exclusive rights to reproduce, distribute, publicly perform, publicly display.

And section 501, without too much detail, simply labels as infringement anything that violates these exclusive rights.

But section 106 begins with six very important words, "Subject to sections 107 through 118," so we must look at these sections also.

Although some people disagree, I do feel that each of these sections, 107 through 118, are cumulative; that is, if you can fit under one of them, you fit. If you can fit under more than one of them, you may. But, of course, you must fit.

These 12 provisions, 107 through 118, can perhaps be broken into four groups. First is the fair use provision itself. Second involves library or archival taping of television news programs. The third and the most variegated involves a variety of instructional and public broadcasting uses. And the fourth is easy because it is restricted to the taping by the Librarian of Congress.

So let's start with the fair use provision, section 107. This section is the broadest gaged of all limitations. It potentially covers all the uses of all works. Of course, I said "potentially." It is also the first express statutory recognition in this country of fair use principle, stating in essence in its first sentence that "The fair use of a copyright work * * * is not an infringement of copyright." A very important principle.

Incidentally, that bare bones sentence is just about how the provision read early in the revision program, 1965.[8] When the very first revision bill appeared in 1964,[9] it contained a provision with some criteria in some detail which succeeded in making everybody unhappy.

So a year later the 1965 bill provided simply that fair use is not infringement.

A few more specific comments about fair use. First, fair use potentitially applies to "reproduction in copies and phonorecords or by any other means specified in section 106." If we start with the proposition that section 106 grants the copyright owner the right to reproduce copies or phonorecords, et cetera, then we say we have a fair use provision. Isn't this particular language redundant? Isn't it obvouis?

Maybe it is, but this committee notes in its 1976 report that this language—namely, that fair use includes the privilege to make copies or phonorecords, et cetera, "is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to the older forms of use;" it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyong the normal and reasonable limits of fair use.[10]

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[8] E.g., H.R. 4347, 89th Cong., 1st sess.
[9] E.g., H.R. 11947, 88th Cong., 2d sess.

The second specific comment about section 107; the purposes of a use alleged to be fair and the criteria by which it is to be judged as set forth in section 107 are illustrative only. Remember, this is a statute that defines everything, almost. It defines terms such as "such as" and "including," to make it clear that those terms are illustrative and not exhaustive or limitative.[11]

It is interesting to note that the four criteria which we all know by heart—and I won't recite—are not given in any particular priority. Of course they are listed one through four, but there is no particular priority or weighting of importance.

A lot of people have had the habit of saying through the years that the fourth criterion; that is, the potential effect of the use upon the market or value of the work is the most important.

An interesting article on this question appears in the current issue of the Copyright Society Bulletin.[12] I might as well offer a commercial. A student was let loose with a Lexis system and actually counted all the fair use cases to see what the court said were the important factors. And he came up with the conclusion that it wasn't that fourth factor; it was the third factor, the amount and substantiality of the taking.

He was disturbed at that. And I think he disclaimed any attempt to psychoanalyze the courts to find out what really was going on. He just counted the named criteria.

The third comment about 107: A phrase was added by this committee in 1976 to the illustrative purposes of fair use to indicate that multiple copies for classroom use are potentially eligible for the exemption.

And another phrase was added to the illustrative criteria to make sure that the nonprofit educational purpose of a use is accorded proper weight. Of course, it was as a corollary to these concepts that the guidelines which Chairman Kastenmeier referred to were developed. These were two of the three sets of guidelines—the guidelines for classroom reproduction of books and periodicals on the one hand, and the guidelines for music on the other.

You all know, I think, that after those guidelines are set forth in the report, this committee says: "The committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use." [13]

The final comment I have to make about 107 as such, is that the keynote which has been constant since 1966, is the following statement that is substantially contained in both the final Senate report and the final House report.

> The bill endorses the purpose and general scope of the doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Sec-

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[10] H. Rept. No. 94–1476, 94th Cong., 2d sess. 66 (1976).
[11] 17 U.S.C. sec. 101.
[12] Hayes, Classroom "Fair Use": A Reevaluation, 26 Bull. Copr. Soc'y. 101 (1978).
[13] H. Rept. No. 94–1476 *supra*, at 72.

tion 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way.[14]

Thus, this language and this section are among the many examples in the statute where we are forced to read the old cases because Congress is saying clearly that they are not intending to modify that. They want to take it forward.

I am always inclined, being an advocate and a teacher, to say: Are there any questions? But I understand that is not part of the format.

We move from section 107, broad-gaged provision, to the next provision of the statute, which brushes by the question that you are concerned with. And that is the section 108(f)(3), the so-called Vanderbilt University exemption which permits specialized off-the-air taping.

The three things to keep in mind are:

First, the taping covers only audiovisual news programs;

Second, the taping can only be by a library or archive;

And third, the library or archive has to fit within the very specific limitations of section 108.

In the conference report, it was recognized that a qualifying library or archive would be free to "reproduce, on videotape or any other medium of fixation or reproduction, local, regional, or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events, and to distribute a limited number of reproductions of such a program on a loan basis."[15]

So there is the conference committee's elaboration of what an audiovisual news program means within the meaning of 108(f)(3).

We now turn to six provisions dealing with instruction and with public broadcasting.

The first is section 110(1), subdivision (1) of section 110, which permits performance or display, not copying, not reproduction, of all works in the course of face-to-face, nonprofit teaching activities under the limitations set forth in that exemption.

However, this exemption is lost if the performance or display of a motion picture or other audiovisual work is given by means of an unlawfully produced copy, provided that the person responsible has actual or constructive knowledge that it was unlawfully produced.

Second, the provision in section 110(2) dealing with instructional broadcasting says nothing about audiovisual works, because these works are not included in that exemption. The very terms of 110(2) would exclude audiovisual works.

Third, one of the cable provisions, section 111(a)(2), contains a provision exempting cable or other secondary transmissions, of material covered by the instructional broadcasting exclusion in section 110(2).

These last two I am only trotting out to say we don't really have to be concerned about them in the sense of taping audiovisual materials.

Fourth, another provision that doesn't quite get there in terms of covering our problem is section 112, particularly 112(b). This grants the so-called ephemeral recording right to public broadcasters, permitting the making of copies or phonorecords as an adjunct to their peforming rights. But again, this limitation does not permit the making of a videotape of a motion picture or other audiovisual works.

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[14] Id. at 66. Cf. S. Rept. No. 94-473, 94th Cong., 1st sess., 62 (1975).

[15] H. Rept. No. 94-1733, 94th Cong., 2d sess., 72 (1976).

Fifth, section 114(b) deals with the question of sound recordings, that is, the recorded performances fixed on a phonorecord as opposed to the musical, dramatic, or other material that is recorded thereon. And it grants an exemption to public broadcasting, which may reproduce such sound recordings for inclusion in "educational television and radio programs."

I might just add a word about sound recordings in a slightly different context, because it has been mentioned sometimes in our connection. That is the slightly different, but related context of home recordings.

It may be recalled that sound recordings were first protected by Federal legislation in 1971, while the general revision program was in progress, and that this committee included in its report the following statement:

> Specifically, it is not the intention of the committee to restrain the home recording from broadcasts or from tapes or records of recorded performances where the home recording is for private use, and with no purpose of reproducing or otherwise capitalizing commercially on it.[16]

Questions have been very sharply raised as to whether this 1971 statement has or has not been implicitly carried forward into the 1976 act.

Moreover, it will be recalled that this dealt only with sound recordings, audio taping, we might say, not videotaping. And in a draft statement made by the Government as comment on an international study on video cassettes,[17] the Government said that this 1971 statement was made, of course, in a context different from that of off-the-air videotaping of television programs incorporating copyrighted motion pictures and other material under copyright. It is unclear how far its implications can be said to apply to the recording of video programs for private use.[18]

I think I have only one more section to go as far as the public broadcasting instructional complex is concerned. That is section 118, which, of course, is the section granting a compulsory license to public broadcasting to broadcast, perform and record published, nondramatic music and pictorial, graphic, and sculptural works upon payment of a fee, either to be negotiated or determined by the Copyright Royalty Tribunal.[19]

Under this provision, as most of you know, schools are given the right to reproduce such works—that is, the musical or art works—as contained in the public broadcast programs, under specific limitations, including the requirement of destruction at the end of 7 days.

It should be noted that this section does not seem to grant the right to tape the program itself over and above the music and art that is in it. But such a privilege to tape the program itself, is of course, granted by various public broadcasting entities such as PBS' 7-day policy. That doesn't come out of the statute.

I might just tarry a moment on this question of retention because I just have a sneaking feeling somehow or other that may come up as the day goes on, the question of 7 days or what.

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[16] H. Rept. No. 487. 92d Cong., 1st sess. 7 (1971).

[17] Klaver, *The Legal Problems of Video-Cassettes and Audio-Visual Discs*, 23 Bull. Copr. Soc'y. 152 (1976).

[18] Draft *Comments of the United States of America on the Study by Professor Franca Klaver Concerning the Legal Problems of Video-Cassettes and Audiovisual Discs*, 17 (1977).

[19] The first such proceeding resulted in a determination reported at 43 Fed. Reg. 25070 (June 8, 1978).

The notion of a limited period of retention contained in this provision and policies such as PBS' are not without precedents in the legislative history of these kinds of problems. For example, going back to section 107, the 1967 House report and the 1975 Senate report, in discussing fair use, give as an example something that might normally be fair use: Exercises by student, such as in shorthand or music classes or other classes. And the reports say that such exercises, quote, "would normally be regarded as fair use unless the copies or phonorecords were retained or duplicated." [20]

The word "retained" is a key word. Maybe that hints back to this problem.

Moreover, in the same pair of reports, the committees took note of the special problem involved in the reception of instructional television programs in remote areas, particularly extending over several time zones. The Senate committee stated as follows:

> The Committee believes that the making by a school located in such a remote area of an off-the-air recording of instructional television transmissions for the purpose of a delayed viewing of the program by students for the same school constitutes a fair use. The Committee does not intend to suggest, however, that off-the-air recording for convenience would under any circumstances be considered fair use. To meet the requirement of temporary use, the school may retain the recording for only a limited period of time after the broadcast.

This is language in the legislative reports.[21]

Finally, it should be noted that the National Commission on New Technological Uses of Copyrighted Works, CONTU, in its final report, recommended that a scholar using a computer for fair use purposes should, to enjoy that privilege, erase any copy created in a machine memory after completion of the project. [22]

I close this trip through the statute by noting the authority given to the Librarian of Congress in two places under the mandatory deposit section, 407, and at the tail end of the statute, in the American Television and Radio Archives Act, contained in transitional and supplementary section 113.

Now, for the time that remains, I will meander through history to try to give you some of the background of fair use in the courts, because, as I indicated earlier, that background remains relevant.

I know that I am not going to get through the meandering. So I should say at the outset that I counted up four cases that dealt specifically with off-air taping:

The Walt Disney against Alaska Network case,[23] which was commercially done. I will mention it if I have time later.

Encyclopaedia Britannica against BOCES, a case up in New York.[24]

Universal and Disney against Sony in the BetaMax case on the west coast.[25]

The CBS against Vanderbilt case which, though settled, gave rise to the audiovisual news program provision in section 108(f)(3) mentioned earlier.

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[20] E.g., S. Rept. 94–473, *supra*, at 63 (1975).

[21] Final report at 98, n. 171 (July 31, 1978).

[22] *Id.* at 66. Cf. § 111(e) (certain video taping by cable systems permitted).

[23] *Walt Disney Productions v. Alaska Television Network, Inc.*, 310 F. Supp. 1073, 164 USPQ 211 (W.D. Wash. 1969).

[24] *Encyclopaedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243, 197 USPQ 280 (W.D.N.Y. 1978).

[25] *Universal City Studios, Inc. v. Sony Corp. of America*, No. cv 76 3520 F. (C.D. Cal.).

Many people trace fair use in this country back to 1841, when a Supreme Court Justice and scholar named Joseph Story was traveling around the country on circuit, as they did in those days, hearing cases by himself. And in the case of Folsom against Marsh,[26] the issue was whether infringement resulted from the taking of a number of pages of the plaintiff's work on George Washington. Story found it a very troublesome case. He makes that clear.

And he says:

> We often, in deciding cases of this sort, look to the nature and objects of the selections made, the quantity and quality of the materials used, and the degree in which the use may prejudice the sale or diminish the profits or supersede the objects of the original work.

I suppose if his opinion were copyrightable and still under copyright, section 107 might be accused of infringing such copyright. But it does show that the criteria were stated, restated, juggled and supplemented through a century or so after Justice Story.

Normally, we are dealing with a particular problem in those cases, which may not be the problem before you—whether the quantity and quality of what was taken was sufficient under the particular circumstances to amount to infringement.

For example, one group of cases involved clearly incidental use of materials, such as open the pages of a short story and you find the heroine walking into a room, "and the radio is playing * * * 'You must remember this, a kiss is just a kiss'," where the lyrics or part of the lyrics of a song are used as the background. And in those cases, they were uniformly held to be fair use.[27]

In the electronic era, the same thing. The flashing or showing of a hand puppet on television was considered to be fair use.[28]

And even more recently, a few blocks from my law school, when the San Gennaro street festival was going on, ABC news taped a float going by and caught the strains of an Italian song and was sued because it put the song on evening television—the 11 o'clock news.

Incidentally, ABC didn't just run the scene. It actually synchronized the sound track with the reporter's voice, so there was a slight variation from the way it was picked up.

That was held to be fair use, the judge saying he didn't have to get to the first amendment implications of that.[29]

Another familiar setting of fair use is in the field of criticism and scholarly use. We all know that a critic can quote extensively from a work and so can a scholar writing in the same field.

Incidentally, a scholar, according to the *Howard Hughes* case, happily, can be an average citizen rather than a college professor. Scholorship is broadly treated.

In fact, the same court last year had to decide whether Louis Nizer's book on the Ethel and Julius Rosenberg trial and execution was scholarly because Nizer had used some of the letters written by the Rosenbergs from the deathhouse.

It was held that the trial court had to consider carefully whether the particular use made by Nizer of the letters was scholarly.[30]

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[26] *Folsom* v. *Marsh*, 9 Fed. Cas. 342, No. 4,901.

[27] E.g., *Shapiro Bernstein & Co.* v. *P. F. Collier & Son Co.* 26 USPQ 40 (S.D.N.Y. 1934).

[28] *Mura* v. *Columbia Broadcasting System, Inc.*, 245 F. Supp. 587, 147 USPQ 38 (S.D.N.Y. 1965).

[29] *Italian Book Corp.* v. *American Broadcasting Cos.*, 200 USPQ 312 (S.D.N.Y. 1978).

[30] *Meeropol* v. *Nizer*, 560 F. 2d 1061, 195 USPQ 273 (2d cir. 1977), *Cert. denied* 434 U.S. 1013, 196 USPQ 592 (1978).

A heavily litigated aspect of fair use that I don't have time to get into, but it is one of the more colorful aspects, is criticism that is humorous in the nature of parody or burlesque. The question there is whether in the nature of parody or insulates the parodist from liability.

And as Jack Benny showed when he transformed "Gaslight," the melodrama, into a comedy called "Autolite," parody doesn't insulate.[31] But as later cases show, it does give leeway, enough leeway to conjure up the original.[32]

Now, a similar bit of leeway, but not an exemption, is the nonprofit element, which gets us a little closer to your subject, for example, just like parody, nonprofit uses do have some breathing room and some leeway, but that leeway is not complete.

That would bring us to a most dramatic incident, that involved the teacher out in Iowa. Remember? Everybody has heard about that music teacher who found that the song in question did not suit his choir's needs, so he rearranged it, made 48 copies on the school duplicating machine, performed it once in the school and twice in church on Sunday.

There are a lot of interesting factors in the case—good faith in that he sent the arrangement to the proprietor, and some of the bad vibes that the proprietor gave in his overbearing letters and in his testimony on the stand. Nevertheless the district court said that that is fair use, that the teacher was just experimenting.[33]

But as most of you know, that was unanimously reversed by the eighth circuit, which said, notwithstanding the innocence the substantiality of the copying made it infringement.[34]

This sent shock waves through the educational community including many of you back in 1962, and it stepped up the requests of that community for a specific educational exemption across the board, so to speak, which, of course, was not granted. Rather, what was granted were the specific provisions I indicated earlier.

I am getting to the end of my presentation without reaching the cases that I mentioned earlier. I will do the best I can before the break. And that is to talk about the shift that I identified at the outset.

To me, a philosophical shift could be detected in the 1968 case involving the home movies of the procession, the tragic motorcade, that turned out to be the assassination of President Kennedy. Several of the significant frames in that case were copied. And the judge, in a very complex case, discussing all the issues, including fair use, trotted out the four criteria that were then taking shape in the revision program.

But in my opinion—and as you see, I like to reduce everything to a single sentence—I think the aggregate indication of the holding in that case was the sentence: "There is a public interest in having the fullest information about available on the murder of President Kennedy." [35]

This is not to suggest that public interest as perceived by a particular judge will automatically bury copyright owners' rights. It does suggest, though, that the emphasis might be shifting from the cases that I mentioned earlier to cases where sometimes a substantial, if not total, amount is taken by means of new technology, not for incorporation in a new work, but for the important purposes of research or education.

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[31] *Benny* v. *Loew's, Inc.*, 239 F. 2d 532, 112 USPQ 111 (9th Cir. 1956), aff'd by an equally divided Court, 356 U.S. 43, 116 USPQ 479 (1958).

[32] *Columbia Pictures Corp.* v. *NBC*, 137 F. Supp. 348, 107 USPQ 344 (S.D. Cal. 1955).

[33] *Withol* v. *Crow*, 199 F. Supp. 682, 132 USPQ 392 (S.D. Iowa 1961). For reversal, see note 32 *infra*.

[34] 309 F. 2d 777, 135 USPQ 385 (8th Cir. 1962).

[35] *Time, Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130, 159 USPQ 663 (S.D.N.Y. 1968).

This is, of course, the issue that is facing you. This difference is a two-edged sword. Copyright owners, on the one hand, argue that the very purpose of fair use was to encourage further creation and that a library photocopy or video tape by educators, for example, does not fit into that category. Indeed, in the words of Irwin Karp, it is "bare, naked reproduction."

Librarians and educators, on the other hand, have argued that if fair use is permitted in the case of a published, potentially competitive work, then it is even more clearly fair use to do something that doesn't produce a potentially competitive work.

The only other case involving bare, naked reproduction was the *New York Herald Tribune* case in 1941, that I don't have time to go into.[36] But I think there was some recognition through the years that there was some form of such bare, naked reproduction which was fair use.

For example, the Register's 1961 Report lists two or three of those, such as the reproduction for litigation or legislation. et cetera.[37]

The matter was, of course, tested or supposed to be tested in the Williams and Wilkins against the United States case, where the question was whether the photocopying of journal articles from the plaintiffs' medical journals constituted infringement or fair use.

After a trial judge's decision in favor of the publisher,[38] the Court of Claims reversed, 4 to 3, finding fair use.[39] I'm sure many of you have read the opinions or summaries.

I suppose again, if we reduced ourselves to the single sentence, we probably would come up with something that is reminiscent of the Kennedy assassination photograph case. And that is, the four judge majority felt potential harm to medical research by finding infringement seemed to them to outweight the potential harm to the publisher by finding fair use.

The Supreme Court heard the case and split 4 to 4. It left the case without the Supreme Court's imprimatur, and therefore, we're left with the close decision and also the self-limiting factors that the *Williams and Wilkins* opinion involved.

I mentioned the Walt Disney against Alaska Network case.[40] And that is the case where there was off-the-air videotaping of a program in the State of Washington, and shipping it to Alsaka. Fair use wasn't even raised in that case; at least it didn't appear in the opinion. And the commercial use of that certainly made it, I think, an easier case than otherwise.

So finally, I come to the case in Buffalo brought by the Encyclopedia Britannica, General Learning Corp., and Time-Life against BOCES.[41] I have the feeling most of you know that case as well, if not better, than I. The introductory statement of the court bears on what you are doing today:

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[36] *N.Y. Tribune Co. v. Otis & Co.*, 39 F. Supp. 67, 49 USPQ 361 (S.D.N.Y. 1941).

[37] "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Report to House Committee on Judiciary," 87th Cong., 1st sess., 24 (1961).

[38] 172 USPQ 670 (1972). For reversal, see note 39 *infra*.

[39] 487 F. 2d 1345, 180 USPQ 49 (Ct. Cl. 1973), "aff'd by an equally divided Court," 420 U.S. 376, 184 USPQ 705 (1975).

[40] See note 23 supra.

[41] See note 24 supra.

> Educational institutions have been videotaping television broadcasts for strictly educational purposes for some time. The legality of such copying has never been determined either by the courts or the legislature. The problem of accommodating the competing interests of both educators and film producers raises policy questions which the legislature is better equipped to resolve. However, Congress has not as yet provided a legislative solution to the problem, but has left it to the courts.[42]

The court reviewed briefly the fair use doctrine, then focused on the *Williams and Wilkins* case and the distinguishing factors that the court felt were present. In particular, the court did emphasize at a couple of places the fact that this was a preliminary injunction motion, that is, an early, preliminary, though important decision, but one that is not final necessarily, nor one that has all the evidence in.

My latest information as of yesterday was the case is still being vigorously prosecuted and vigorously defended. So it may go to trial, at which point there would be another decision.

For example, on the question of the effect of the taping on the plaintiff, the court said, "The court must assume for the purposes of this motion that Boces' practices have had or will have a substantial affect on the plaintiffs." [43]

Two final comments:

First, the court in *Boces* took pains to point out that:

> This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use, but concerns a highly organized and systematic program for reproducing videotapes on a massive scale." [44]

This brings to mind some language that were in the reports such as the 1975 Senate report, stressing that the spontaneity of classroom action by classroom teachers, is a factor favoring fair use, and then said:

> A different result is indicated where the copying was done by educational institutions, school systems or larger units, or where the copying was required or suggested by the school administration, either in special instances or as part of a general plan." [45]

As I mentioned earlier, at this very moment in Los Angeles, the *Betamax* case is on trial, right in the course of a trial. It does involve home use rather than school use.

Some people argue one way or the other on the difference. In other words, everyone agrees there are differences.

Some people think that is an easier case, others, a harder case.

As you know, in that case the plaintiffs are trying to establish liability on the part of the home user—that is, direct infringement—and also that the stores which are selling and demonstrating the equipment and, of course, Sony, that is manufacturing the equipment, according to the plaintiffs, should also be held liable.

I think the outcome of the case will be interesting as will all sorts of other developments.

Thank you for your time.

[Applause.]

Mr. **Lehman**. Thank you very much, Alan. I think that is an excellent way to begin.

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[42] 447 F. Supp. at 248.
[43] Id. at 251.
[44] Id. at 252.
[45] S. Rept. No. 94-473 supra at 63.

I think we all now have a good grounding in what perhaps—I would like to say "what the law is," but I think we have to say "what the law is not." Because it doesn't seem thet we have much on this area. And of course that is one of the things we will be trying to work out within the next few months with the committee which Congressman Kastenmeier referred to.

Now the agenda says, "coffee break," and we had attempted to provide that by having a big 100-cup coffeemaker over here which unfortunately does not work.

We have a smaller one which does work, which has about 35 cups in it. So I invite you to begin the competition which will begin after coffee break among various sides by struggling to gain the few cups of coffee we have.

And there also is a little carryout coffee shop one floor below us here which has doughnuts and other things in case you haven't had anything to eat this morning.

However, we are going to try to move right along. So if you could be back in 10 minutes, then we can proceed to go on and we will hear presentations by the Copyright Proprietors.

[Brief recess.]

Mr. LEHMAN. Now we really get to the meat of the program by beginning to hear from both sides to the controversy on off-air recording.

Most of you have agendas, I hope. If you don't have them, they are at the table where you came in, and they list who is going to speak when, and so on. And I hope that this meets with most people's approval as a fairly representative group.

We are going to start out with a presentation by the Copyright Proprietors. And everyone excepting the networks will have approximately 15 minutes each.

Because the commercial networks represent a common, but not identical interest, each one of them, they are going to have to share their time among themselves. So their presentations will be sort of in little bits and pieces of maybe about 5 to 8 minutes each.

I would like to start out with the Association of Media Producers who will be represented by Mr. James LeMay of Coronet Instructional Media in Chicago, a producer for the educational market.

One thing I would like to say just before we go ahead, on an administrative note: When we break for lunch, the program says 1 o'clock, and it is just as well we are running about 15 minutes late, which is to be expected, because this building has a cafeteria in the basement one floor below, which is open to the public—that is, those who are not Members of Congress or staff people—at 1:15.

So we will adjourn at about 1:15 Everybody will be able to get a fairly efficient lunch in the cafeteria below.

So you might keep that in mind if you are worried about where you are going to eat lunch.

We will proceed with Mr. LeMay.

TESTIMONY OF JAMES LEMAY, CORONET INSTRUCTIONAL MEDIA, ON BEHALF OF THE ASSOCIATION OF MEDIA PRODUCERS

Mr. LEMAY. Thank you. Good morning.

My name is James LeMay. I am general manager of Coronet Films in Chicago. And I am cochairman of the Copyright Committee of the Association of Media Producers.

The Association of Media Producers is the national association of producers and distributors of audiovisual educational materials. Virtually the only market for our products is schools and libraries.

Our members are strong advocates of increased and more effective utilization of technology in education and training, and our industry plays a vital role in the country's educational system.

We agree wholeheartedly that students and teachers should have convenient access to the widest possible variety of materials which will assist in the learning process; indeed that is the reason our companies exist.

However, we are deeply concerned that in the endeavor to meet the needs of our educational system, the impact on creators of these materials is being neglected. The goal of everyone in this room is to improve instruction.

This can only be fully achieved if a proper balance exists between the requirements of the schools and the rights which copyright proprietors must possess—if they are to continue to provide the very instructional materials teachers feel are an essential part of quality education.

We must work together to meet the needs of our schools and to ensure just compensation to copyright proprietors for the use of materials taped off the air. Only then can we assure the survival of a private educational media industry and prevent the educational system from becoming completely dependent on instructional resources designed and produced under the aegis of Government agencies.

Most people think of films and television in terms of entertainment programs, large Hollywood studios, and commercial TV networks. However, that is not our industry. It is important to understand the unique nature of the educational media industry in order to recognize the effect of unauthorized off-air recording.

First, our industry is composed primarily of small companies: 43.2 percent of AMP's members in 1978 had gross annual sales volumes of $500,000 or less; less than 7 percent of our members had gross sales volumes of $5 million or more. In today's economy, this is indeed "small business."

Second, we sell our products to a very limited marketplace. Educational materials are not sold to consumers in general, nor for entertainment; in 1978, schools, colleges, and libraries accounted for 93 percent of industry sales. The number of schools and libraries themselves is very limited. For example, there are fewer than 5,000 school and library customers for educational films in the United States.

Third, the number of copies of audiovisual products produced and sold is very limited. Compared with textbooks, for example, which are generally provided on the basis of one to a student, one or two prints of a 16-millimeter educational film may serve an entire school system of moderate size; a single filmstrip may be used by all the pupils in one or more grades. A successful film will sell a few hundred prints during its lifetime; a well-received filmstrip set, in the low thousands—and this is over a 5- to 10-year period.

The initial investment in an educational audiovisual product is substantial and includes market research, consultation with educational specialists, development, production, and market testing before we begin marketing.

The combination of all these factors—substantial investment, narrow marketplace, limited number of copies sold, and sales over an extended period—means that uncompensated use of duplication of these materials has a severe impact on the economic viability of the educational media industry.

There have been several important trends in the U.S. economy and in education that have had a significant impact on the educational media industry since 1968.

Of major importance is the sharp reduction in the real dollars available for acquisition of educational media: for example, funding for the Federal school library resources program—on which schools are heavily dependent—has decreased by $10 million.

This reduction in funding, combined with inflation reflected by a 75-percent increase in the consumer price index over the past 10 years, has seriously affected every school budget.

A second factor, harder to measure but obviously of consequence, was the decrease in actual number of school buildings and, with the trend toward regionalization and consortia, a drop in the number of purchasers of 16-millimeter film.

It should be no surprise then to note that total industry sales from 1974–77 actually decreased by $17.3 million. If an inflation factor were considered, the decrease in real dollars would be even more dramatic.

Although 16-millimeter film sales rose during this period, it was by a mere $6.3 million. When allowance is made for the price increases in 16-millimeter film for the same 4-year period, the number of units sold decreased by 16 percent in those 4 years.

These were indeed signs of a very troubled industry. Many producers, therefore, looked to the emerging video technology which had begun to prove itself both as a new medium and as an effective educational tool.

While many schools, colleges, and public libraries developed programs using video materials in a variety of ways, our members—the companies in the media industry—worked with these educators by providing materials for use on video systems and by bringing to them materials which were produced originally in broadcast forms.

Television is becoming increasingly important to the educational media industry, not only as a market, but as a source of product which can be acquired for nonbroadcasting distribution. Individual educational stations and the PBS network, and to a lesser degree the commercial networks, are potential customers for our member producers who can sell or license their materials for broadcast.

An equally important source of revenue is the distribution of broadcast programs to schools and libraries in 16-millimeter or video format. In the past 10 years, the sale of materials for television—sold in 16-millimeter or videocassette format—has more than doubled. During the same period of time, the dollar volume of sales of educational films to television—public and private—more than tripled.

Video recording capability has permitted schools to make use of video programing, when appropriate, in new, creative ways. Our members have worked with educators throughout the country to make materials available in video formats and to develop licensing arrangements for special duplication and use situations.

Our association has encouraged and assisted our members in developing licensing programs and has recently published a Directory of

Rights and Permission Officers to assist educators in locating materials and licensing agencies.

In a dangerous irony, what promised to bring the classroom into the 20th century now threatens the very existence of the producers and creators who pioneered this exciting medium.

The growing acquisition and use of video recording facilities in the schools was stimulated further by the policies promulgated by several publicly financed broadcast entities, including PBS, Agency for Instructional Television, and Great Plains National Instructional Television Library, which permit free rerecording and use of their programs for periods ranging from 7 days to 1 year. As an extension of this concept, Federal agencies are now beginning to require that rerecording rights accompany any materials producd with Government funds.

Unfortunately, educational institutions in increasing numbers are also recording and retaining commercially produced programs without permission to do so. These programs were licensed only for broadcast, and the nonbroadcast distribution rights were reserved to the producer—for his own distribution or to license an educational distributor.

Unlicensed off-air recording and subsequent use of copyrighted programs has forced several commercial producers and distributors to draw back from their partnerships with both public and commercial television stations—partnerships which have potentially great benefits for education as well as for individual companies.

One company has refused to renew all program licenses to educational television stations that were in effect in the previous year.

It must also be realized that it is not only the film companies which are affected by off-air taping. The consequences of unlicensed taping are desperately serious for sound filmstrip and audio producers because these companies license recording and filmstrip rights, independent of film rights, from publishers and authors, paying them an advance against royalties, and in addition paying scriptwriters, actors, artists, musicians, et cetera, to produce programs that very effectively motivate reading and learning skills. With off-air typing of the same titles, these companies are jeopardizing their market.

Likewise, commercial distributors are more and more reluctant to acquire rights to distribute broadcast materials in 16-millimeter or video format, because of the same fear that their market has already been damaged by off-air recording.

The effect of this is already being felt. Some public televisions stations which depend on royalties from commercial distribution of their programs for funds to be used in new production can no longer easily convince private companies to invest in the acquisition of these distribution rights.

AMP believes that the present symbiotic relationship between the public and private components of the educational community is in serious danger. The relationship requires a balance between public and private sector involvement in the production of educational materials. Increased public and governmental involvement in the production of educational programs has reached dramatic proportions—through specific production grants and subsidy of free off-air recording and use rights.

The implications of this situation are grave.

First, if private producers and distributors are unable to realize the needed return on their investment, production of quality materials will decrease as companies leave the industry or are forced to drastically curb their production investments. This is not speculation; already we have seen the first decrease in production in the history of the industry.

The 1977 AMP analysis of industry trends revealed an 18-percent decline in 16-millimeter film production in 1977 with a projected decline of 13 percent in 1978.

Since 1977 over 10 companies have either gone out of business, been acquired by larger companies, or changed to printed materials, since continued A-V production investments could not be justified.

If this trend continues, not only will teachers and students suffer from a greatly reduced variety of materials from which to choose, but many materials produced specifically for instruction will, by necessity, fall by the wayside.

Educational producers today design programs to conform to the needs and curricula of the schools. If television programs taped off the air are increasingly substituted for curriculum materials, educators will be depriving their classrooms of many of the support systems built into their products by educational distributors.

And if private production of materials decreases dramatically, what consequences does that have for the still numerous school systems which do not have video recording capabilities?

Second, increased government subsidies for production of educational materials will force educators faced with austere budgets to opt for these products—not because they are necessarily better, but because they are less expensive.

The "low bid" syndrome must not be allowed to unduly influence the selection of the teaching and learning tools that structure so much of the classroom time.

Furthermore, a national curriculum runs counter to the basic framework of our educational system; yet a trend in this direction can only be strengthened by a shift toward reliance on government for the funding of materials production.

Serious consideration should be given to the present-day situation in Canada, where more of the large organizations in the communications field are agencies of the Federal or Provincial Governments.

The Ontario Educational Communications Authority can function as a good example of the above process. OECA is mandated to produce and distribute—including broadcast—educational materials within the Province of Ontario. Almost all of its funding is provided by the Provincial Government, although about 5 percent is derived from the sale of its programs to other jurisdictions.

OECA has, from the outset, encouraged schools and other community organizations to tape its programs off the air for later use without charge.

The effect has been the almost total elimination of the private sector from the prerecorded videotaped market. The OECA pricing policy has created the standard for the marketplace—customers think that a half hour tape should cost no more than the $18 to $20 charged by OECA, a fee made possible only by governmental subsidy.

The net result has been the almost total dependence of the educational broadcaster—and the growing dependence of schools and libraries—upon government-funded production, and that funding is now in jeopardy. Without careful assessment of the roles of both public and private sector producers in this country, the same results can almost be assured.

Another very important consideration, especially today, is the economic impact which will be felt if a private educational media industry is unable to survive.

In a time when the government and citizens alike have set reduced government spending as a national priority, it does not seem to make sense to increase public spending in an area where the private sector, if allowed, is willing to provide the necessary investment for both production and distribution—and is willing to pay distribution royalties to those public entities, such as public television stations, which do have a mandate to produce materials to meet public needs.

The private sector—in this instance the educational media industry—has the further advantage of operating in an open marketplace where competition will help insure quality products at a fair price and where the success of a product or a company will bring increased tax revenue.

On the other hand, increased public spending will be necessary if concerted efforts are not made to protect the rights of companies engaged in the production and nonbroadcast distribution of programs aired on television.

In conclusion, the educational media business is in a unique position—a very small industry almost entirely dependent on sales to schools, whose products are the creative presentations of ideas.

We deal in "intellectual property," not in wood, or metal, or plastic, but "intellectual property" which is the very heart of education.

We have over the years worked with our colleagues in education to try to meet their needs as they arose. In recent years, we have welcomed the new technology and devised new methods to provide access to our products as the schools' requirements have changed.

Although we do not deal in wood or metal or plastic, but in the dissemination of ideas, we believe that these "intellectual properties" must be valued and their creators and distributors fairly compensated to ensure the future growth and improvement of American education.

We agree that access to ideas is vital, but we insist that it is not in the national interest to destroy the free market source of these materials in order to achieve free access.

We assure the committee of our willingness to work with the educational community to provide reasonable access to copyrighted products without depriving creators and producers of their rights.

Thank you.

[Applause.]

[The prepared statement of the Association of Media Producers follows:]

STATEMENT OF THE ASSOCIATION OF MEDIA PRODUCERS ON OFF-THE-AIR RECORDING

The Association of Media Producers is the national association of producers and distributors of audio-visual educational materials. Virtually the only market for our products is schools and libraries.

Our members are strong advocates of increased and more effective utilization of technology in education and training, and our industry plays a vital role in the country's educational system. We agree wholeheartedly that students and teachers should have convenient access to the widest possible variety of materials which will assist in the learning process; indeed that is the reason our companies exist.

However, we are deeply concerned that in the endeavor to meet the needs of our educational system, the impact on creators of these materials in being neglected. The goal of everyone in this room is to improve instruction. This can only be fully achieved if a proper balance exists between the requirements of the schools and the rights which copyright proprietors must possess—if they are to continue to provide the very instructional materials teachers feel are an essential part of quality education.

We must work together to meet the needs of our schools and to ensure just compensation to copyright proprietors for the use of materials taped off-the-air. Only then can we assure the survival of a private educational media industry and prevent the educational system from becoming completely dependent on instructional resources designed and produced under the aegis of government agencies.

Most people think of films and television in terms of entertainment programs, large Hollywood studios, and commercial TV networks. However, that is not our industry. It is important to understand the unique nature of the educational media industry in order to recognize the effect of unauthorized off-air recording.

First, our industry is composed primarily of small companies: 43.2 percent of AMP's members in 1978 had gross annual sales volumes of $500,000 or less; less than 7 percent of our members had gross sales volumes of $5 million or more. In today's economy, this is indeed "small business."

Second, we sell our products to a very limited marketplace. Educational materials are not sold to consumers in general, nor for entertainment; in 1978, schools, colleges and libraries accounted for 93 percent of industry sales. The number of schools and libraries themselves is very limited. For example, there are fewer than 5,000 school and library customers for educational films in the United States.

Third, the number of copies of audio-visual products produced and sold is very limited. Compared with textbooks, for example, which are generally provided on the basis of one to a student, one or two prints of a 16mm educational film may serve an entire school system of moderate size; a single filmstrip may be used by all the pupils in one or more grades. A successful film will sell a few hundred prints during its lifetime; a well-received filmstrip set, in the low thousands—and this is over a five to ten year period.

The initial investment in an educational audio-visual product is substantial and includes market research, consultation with educational specialists, development, production, and market testing before we begin marketing. The combination of all these factors—substantial investment, narrow marketplace, limited number of copies sold, and sales over an extended period—means that uncompensated use of duplication of these materials has a severe impact on the economic viability of the educational media industry.

There have been several important trends in the U.S. economy and in education that have had a significant impact on the educational media industry since 1968.

Of major importance is the sharp reduction in the real dollars available for acquisition of educational media: for example, funding for the Federal school library resources program (on which schools are heavily dependent) has decreased by $10 million. This reduction in funding, combined with inflation reflected by a 75 percent increase in the consumer price index over the past ten years, has seriously affected every school budget.

A second factor, harder to measure but obviously of consequence, was the decrease in actual number of school buildings and, with the trend toward regionalization and consortia, a drop in the number of purchasers of 16mm film.

It should be no surprise, then, to note that total industry sales from 1974–77 actually decreased by $17.3 million. If an inflation factor were considered, the decrease in real dollars would be even more dramatic. Although 16mm film sales rose during this period, it was by a mere $6.3 million. When allowance is made for the price increases in 16mm film for the same four year period, the number of units sold decreased by 16 percent in those four years.

These were indeed signs of a very troubled industry. Many producers, therefore, looked to the emerging video technology, which had begun to prove itself both as a new medium and as an effective educational tool.

While many schools, colleges, and public libraries developed programs using video materials in a variety of ways, our members—the companies in the media industry—worked with these educators by providing materials for use on video systems and by bringing to them materials which were produced originally in broadcast forms.

Television is becoming increasingly important to the educational media industry, not only as a market, but as a source of product which can be acquired for non-broadcast distribution. Individual educational stations and the PBS network, and, to a lesser degree, the commercial networks, are potential customers for our member producers who can sell or license their materials for broadcast.

An equally important source of revenue is the distribution of broadcast programs to schools and libraries in 16mm or video format. In the past ten years, the sale of materials for television (sold in 16mm or videocassette format) has more than doubled. During the same period of time, the dollar volume of sales of educational films to television (public and private) more than tripled.

Video recording capability has permitted schools to make use of video programming, when appropriate, in new, creative ways. Our members have worked with educators throughout the country to make materials available in video formats and to develop licensing arrangements for special duplication and use situations.

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In a dangerous irony, what promised to bring the classroom into the 20th centrury now threatens the very existence of the producers and creators who pioneered this exciting medium. The growing acquisition and use of video recording facilities in the schools was stimulated further by the policies promulgated by several publicly-financed broadcast entities, including PBS, Agency for Instructional Television, and Great Plains National Instructional Television Library which permit free re-recording and use of their programs for periods ranging from seven days to one year. As an extension of this concept, Federal agencies are now beginning to require that re-recording rights accompany any materials produced with government funds.

Unfortunately, educational institutions in increasing numbers are also recording and retaining commercially-procuced programs without permission to do so. These programs were licensed only for broadcast, and the non-broadcast distribution rights were reserved to the producer—for his own distribution or to license an educational distributor.

Unlicensed off-air recording and subsequent use of copyrighted programs has forced several commercial producers and distributors to draw back from their partnerships with both public and commercial television stations—partnerships which have potentially great benefits for education as well as for individual companies. One company has refused to renew all program licenses to educational television stations that were in effect in the previous year.

It must also be realized that it is not only the film companies which are affected by off-air taping. The consequences of unlicensed taping are desperately serious for sound filmstrip and audio producers because these companies license recording and filmstrip rights, independent of film rights, from publishers and authors, paying them an advance against royalties and, in addition, paying scriptwriters, actors, artists, musicians, etc., to produce programs that very effectively motivate reading and learning skills. With off-air taping of the same titles, these companies are jeopardizing their market.

Likewise, commercial distributors are more and more reluctant to acquire rights to distribute broadcast materials in 16mm or video format, because of the same fear that their market has already been damaged by off-air recording. The effect of this is already being felt. Some public television stations which depend on royalties from commercial distribution of their programs for funds to be used in new production can no longer easily convince private companies to invest in the acquisition of these distribution rights.

AMP believes that the present symbiotic relationship between the public and private components of the educational community is in serious danger. The relationship requires a balance between public and private sector involvement in the production of educational materials. Increased public and governmental involvement in the production of educational programs had reached dramatic proportions—through specific production grants and subsidy of free off-air recording and use rights.

The implications of this situation are grave. First, if private producers and distributors are unable to realize the needed return on their investment, production of quality materials will decrease as companies leave the industry or are forced to drastically curb their production investments. This is not speculation; already we have seen the first decrease in production in the history of the industry.

The 1977 AMP analysis of industry trends revealed an 18 percent decline in 16mm film production in 1977 with a projected decline of 13 percent in 1978. Since 1977, over ten companies have either gone out of business, been acquired by larger companies, or changed to printed materials, since continued A-V production investments could not be justified.

If this trend continues, not only will teachers and students suffer from a greatly reduced variety of materials from which to choose, but many materials produced specifically for instruction will, by necessity, fall by the wayside. Educational producers to day design programs to conform to the needs and curricula of the schools. If television programs, taped off-the-air, are increasingly substituted for curriculum materials, educators will be depriving their classrooms of many of the support systems built into their products by educational distributors.

And, if private production of materials decreases dramatically, what consequences does that have for the still numerous school systems which do not have video recording capabilities.

Second, increased government subsidies for production of educational materials will force educators faced with austere budgets to opt for these products—not because they are necessarily better, but because they are less expensive. The "low bid" syndrome must not be allowed to unduly influence the selection of the teaching and learning tools that structure so much of classroom time.

Futhermore, a national curriculum runs counter to the basic framework of our educational system; yet a trend in this direction can only be strengthened by a shift toward reliance on government for the funding of materials production.

Serious consideration should be given to the present day situation in Canada, where more of the large organizations in the communications field are agencies of the federal or provincial governments.

The Ontario Educational Communications Authority can function as a good example of the above process. OECA is mandated to produce and distribute (including broadcast) educational materials within the province of Ontario. Almost all of its funding is provided by the Provincial Government, although about 5 percent is derived from the sale of its programs to other jurisdictions.

OECA has, from the outset, encouraged schools and other community organizations to tape its programs off-the-air for later use without charge. Unfortunately, this policy has nonetheless led to indiscriminate taping of all programs, including commercial productions.

The effect has been the almost total elimination of the private sector from the pre-recorded videotape market. The OECA pricing policy has created the standard for the marketplace—customers think that a half-hour tape should cost no more than the $18-20 charged by OECA; a fee made possible only by governmental subsidy. The net result has been the almost total dependence of the educational broadcaster—and the growing dependence of schools and libraries—upon government-funded productions, and that funding is now in jeopardy. Without careful assessment of the roles of both public and private sector producers in this country, the same results can almost be assured.

Another very important consideration, especially today, is the economic impact which will be felt if a private educational media industry is unable to survive. In a time when the government and citizens alike have set reduced government spending as a national priroity, it does not seem to make sense to increase public spending in an area where the private sector, if allowed, is willing to provide the necessary investment for both production and distribution—and is willing to pay distribution royalties to those public entities (such as public television stations) which do have a mandate to produce materials to meet public needs.

The private sector, in this instance the educational media industry, has the further advantage of operating in an open marketplace where competition will help ensure quality products at a fair price and where the success of a product, or a company, will bring increased tax revenue. On the other hand, increased public spending will be necessary if concerned efforts are not made to protect the rights of companies engaged in the production and non-broadcast distribution of programs aired on television.

In conclusion, the educational media business is in a unique position—a very small industry almost entirely dependent on sales to schools, whose products are the creative presentations of ideas. We deal in "intellectual property," not in wood or metal or plastic, but "intellectual property" which is the very heart of education.

We have, over the years, worked with our colleagues in education to try to meet their needs as they arose. In recent years, we have welcomed the new technology and devised new methods to provide access to our products as the schools' requirements have changed.

Although we do not deal in wood or metal or plastic, but in the dissemination of ideas, we believe that these "intellectual properties" must be valued and their creators and distributors fairly compensated to ensure the future growth and improvement of American education.

We agree that access to ideas is vital, but we insist that it is not in the national interest to destroy the free market source of these materials in order to achieve free access. We assure the Committee of our willingness to work with the educational community to provide reasonable access to copyrighted products without depriving creators and producers of their rights.

Mr. LEHMAN. Next, I would like to call on Stuart Finley, representing the Independent Media Producers Association. Mr. Finley is associated with Stuart Finley Productions in Falls Church, Va.

TESTIMONY OF STUART FINLEY, STUART FINLEY PRODUCTIONS, ON BEHALF OF THE INDEPENDENT MEDIA PRODUCERS ASSOCIATION

Mr. FINLEY. Ivan said he wanted a small producer/distributor. And I explained to him that I am 5 foot 8½ inches, and he said that was not exactly what he had in mind.

I explained to him further that my CPA is developing a statement of assets, and he said, "that is closer."

And of course if he listened to what I had to say, perhaps the case will be clinched.

The current phenomenon of dubbing educational and entertainment features off the air seems almost like an extension of America's frontier exploits of earlier days. It's an adventure—and you get something for nothing.

The adventurous side of it is the magic of electronics. I have just bought my own half-inch VHS NV–8300 made by Panasonic for something less than $1,000. I can now present my little gadget at 2:30 a.m. in the morning to record "Attack of the Mushroom People," and play it back during breakfast instead of having to watch the "Today" show.

The picture is great. In fact, the tuner on the video recorder is better than the one on my 10-year-old TV set and so I now get better pictures than I ever have.

They say that there are about 750,000 home recorders now in use and that by the end of the year there will be about 750,000 in use in America. Three-quarter-inch systems are in wide use but the new half-inch systems are cheaper, smaller, and use smaller, easy-to-store casettes.

Since the engineering is newer on the half-inch systems—it is on the same order of magnitude as the three-quarter-inch sets, although some people may argue with this—the picture and audio quality of a 2-hour tape system is about equal to the old more expensive three-quarter-inch systems. Four-hour, half-inch systems are reported to suffer significant quality loss. Tapes are not equivalent to the three-quarter system, I believe.

Reportedly there are three Sony systems—which are backed by Zenith—all of which are mutually incompatible. There is a single Panasonic system—backed by RCA and a long list of other hardware manufacturers—which is incompatible with the Sony systems.

However, any cassette made on any recorder should be able to be played on another recorder of the same make and model. This means, for example, that if an English teacher has a BetaMax and the school has a BetaMax, the English teacher can record "As You Like It" on a little cassette so-by-so-by-so, and put it in her purse and take it to school, and that is it.

Our little company produces for and distributes to what I call the "Educational Film Market." It's not uncommon to invest between $40,000 and $50,000 in a 23-minute science documentary.

For example, we are currently producing a series called "The Science of Energy" and each of the films we have completed for this series has cost about this much.

Our only income is from the sale of prints or the rental of prints to the educational film market. The Government doesn't pay anything and we have no sponsors. Accordingly, it is our policy that we need to be paid approximately in proportion to circulation. It is an important point.

This leaves us at odds, for example, with the State of Georgia Department of Education which operates a nine-station, interconnected, open-circuit State television network.

If we were to sell them a print of a film, the "duplication rights" which they expect would include dubbing to tape and dubbing off the air.

Their own correspondence concedes: "There are approximately 500 videocassette recorders in Georgia schools."

Approximately 2 years ago, their supervisor of product acquisition wrote us:

> Your objections to the idea of State wide broadcast and duplication rights are noted but I do not find them reasonable. At present there are approximately 475 videotape recorders located in Georgia schools. Even assuming that everyone is used to make a copy of a film and that each copy is then scheduled for repeated use, the greatest number of copies we are talking about is less than 500.

We responded by making a specific offer which was modestly more than the single-print price. They responded by stating that a standard contract was being developed.

We have never received the standard contract, and indeed don't even know if it exists. Perhaps they don't like or need our films. But disregarding that, conceive of the massive confusion of every distributor having to negotiate an elaborate "rights" contract with every film user individually. It would be better if some "standards" could be established. I believe that is the purpose of this meeting and the ad hoc negotiations that are to follow.

However, arrangements can be made for duplication. We have a client who pays annually on the films which they elect to renew from year to year. It is a perfectly acceptable arrangement.

The unusual aspect is the several hundred thousand dollars' worth of mastering and dubbing equipment which they bought and pay to operate.

It is our view that they could simply have bought multiple cassettes from us cheaper. They are spending more money for hardware than for software.

The producer of educational materials can be euchred in other ways than illicit off-air dubbing. For example, the free preview print can be dubbed onto tape at no expense to the user. He just dubs, returns the print, and says "no thanks." But this is complicated by the fact that it takes a 16-millimeter projection system with a special shutter to do this properly.

In fact, dubbing from 16-millimeter film to, for example, half-inch tape is currently difficult to arrange. In order to do this for a client, I research the subject recently and found that you can't get a high-quality job done commercially in the Washington area. I have located a facility in Orlanda, Fla., and another in New Jersey which can do it.

And of course "60 Minutes" showed a few new things in New York City on one of their recent programs.

This brings up another novel scheme. The Oakland, Calif. Unified School District is now operating a "cable" television station on channel 13, KDON. It is soliciting "previews" that would be put on the air.

A representative even went so far as to make a long-distance call to me to solicit such "previews." My response was a little unkind. I suggested that they should be able to convene a preview committee to make purchase evaluations—just like everybody else.

Further, if they haven't bought anything from us in the last 14 years we've been dealing with each other, they must not be a very hot prospect.

One important point is that there is nothing irregular in "authorized" dubbing off the air or in a dubbing facility. For instance, we have just finished producing a series of films for a client which intends to use them in their local school system. This client paid the production fee and owns the distribution rights. They can pull any number of prints, or as many dubs as they want, at cost.

As one of my hobbies, I am vice president of the Independent Media Producers Association, and chairman of its distribution committee. This is a relatively small new group of independent media producers who mobilized to assist in the orientation or perhaps reorientation of the new basic ordering agreement system for Government procurement of production services—a very complicated subject.

At its most recent meeting of its board of directors, the subject of unauthorized off-air dubbing was discussed. The most cogent comment which was made is that when a producer of speculative audiovisuals has put hiw own money on the line, he should have the option to determine how they will be used. "Fair use" should not be a polite term for "piracy."

My personal reaction is that if things get too lenient I will have to get out of this business and cease making educational films speculatively. Perhaps I will try real estate. I suggest, and suggest to you now, that other firms might do the same thing. Perhaps we'd never be missed.

However, I think there is a potential reasonable solution. It may not be a split down the middle, but it could satisfy both parties. And a split down the middle doesn't sound very attractive in these ad hoc negotiations. If somebody wants to cut off my leg, I am not particularly satisfied if he only wants to cut off half of my leg.

The point that I would make, and this is only a sliver of a solution to the total problem, because I only represent, I guess, a sliver of the entire problem area—is that nothing should force an owner to place his product on television.

In other words, he should have the opportunity to opt out by giving up the TV market. And as I say, that is only a sliver of an idea, but you must realize as these negotiations start there is considerable pessimism about their likelihood to succeed. And the more little points of agreement you get of segments that are represented here, the more likelihood there is of total success.

So I would like to mention that the good intentions and the excellent performance of educators is beyond challenge. What is more ideal than education? How can earnest teachers, curriculum people, and materials specialists be severely criticized if they try to overcome budget limitations with ingenuity?

I suggest that it is more practical for "good faith" negotiations to be undertaken in an effort to develop a reasonable solution which pleases both parties and injures neither unduly.

This is far better than inciting a riot and barraging Congress with demands. It is fairly obvious that a solution mighe be more sensitively arrived at by quiet negotiations.

While I don't want to sound like "goody-goody-two-shoes" to all your sophisticated people, let's try it—and remember the phrase "good faith" negotiations.

That's the only way we will have success in this. And I certainly thank you.

[Applause.]

[The prepared statement of Mr. Finley follows:]

STATEMENT BY STUART FINLEY

The current phenomenon of dubbing educational and entertainment features off the air seems almost like an extension of America's frontier exploits of earlier days. It's an adventure . . . and you get something for nothing.

The adventurous side of it is the magic of electronics. I have just bought my own half-inch VHS NV-8300 made by Panasonic for something less than a thousand dollars. I can now preset my little gadget at 2:30 in the morning to record "Attack of the Mushroom People" and play it back during breakfast instead of having to watch the "Today" show. The picture is great. In fact, the tuner on the video recorder is better than the one on my ten year old TV set and so I now get better pictures than I ever have.

They say that there are about 750,000 home recorders now in use and that by the end of the year there will be about 750,000 in use in America. Three-quarter inch systems are in wide use but the new half-inch systems are cheaper, smaller and use smaller easy-to-store cassettes. Since the engineering is newer on the half-inch systems, the picture and audio quality of a two-hour tape system is about equal to the old more expensive three-quarter inch systems. Four hour half-inch systems are reported to suffer significant quality loss.

Reportedly there are three Sony systems (which are backed by Zenith) all of which are mutally incompatible. There is a single Panasonic system (backed by RCA and a long list of other hardware manufacturers) which is incompatible with the Sony systems. However, any cassette made on any recorder should be able to be played on another recorder of the same make and model. This means, for example, that if an English teacher has a BetaMax and the school has a BetaMax, the English teacher can record "As You Like It" on a little cassette by Sony.

Our little company produces for and distributes to what I call the "Educational Film Market". It's not uncommon to invest between $40,000 and $50,000 in a 23-minute science documentary. For example, we are currently producing a series called "The Science of Energy" and each of the films we have completed for this series has cost about this much.

Our only income is from the sale of prints or the rental of prints to the "Educational Film Market". The government doesn't pay anything and we have no sponsors. Accordingly, it is our policy that we need to be paid approximately in proportion to circulation.

This leaves us at odds, for example, with the State of Georgia Department of Education which operates a nine-station, interconnected, open-circuit state television network. If we were to sell them a print of a film, the "duplication rights" which they expect would include dubbing to tape and dubbing off the air. Their own correspondence concedes, quote: "There are approximately 500 videocassette recorders in Georgia schools."

Approximately two years ago, their Supervisor of Product Acquisition wrote us:

"Your objections to the idea of State wide broadcast and duplication rights are noted but I do not find them reasonable. At present there are approximately 475 videotape recorders located in Georgia schools. Even assuming that everyone is used to make a copy of a film and that each copy is then scheduled for repeated use, the greatest number of copies we are talking about is less than 500."

We responded by making a specific offer which was modestly more than the single print price. They responded by stating that a standard contract was being developed. We have never received the standard contract, and, indeed, don't even know if it exists. Perhaps they don't like or need our films. . . . but, disregarding that, conceive of the massive confusion of every distributor having to negotiate an elaborate "rights" contract with every film user individually. It would be better if some "standards" could be established. I believe that is the purpose of this meeting.

However, arrangements can be made for duplication. We have a client who pays annually on the films which they elect to renew from year to year. It is a perfectly acceptable arrangement. The unusual aspect is the several hundred thousand dollars worth of mastering and dubbing equipment which they bought and pay to operate. It is our view that they could simply have bought multiple cassettes from us cheaper. They are spending more money for hardware than for software.

The producer of educational materials can be euchred in other ways than illicit off-air dubbing. For example, the free preview print can be dubbed onto tape at no expense to the user. He just dubs, returns the print, and says "no thanks". But this is complicated by the fact that it takes a 16mm projection system with a special shutter to do this properly.

In fact, dubbing from 16mm film to, for example, half-inch tape is currently difficult to arrange. In order to do this for a client, I researched the subject recently and found that you can't get a high quality job done commercially in the Washington area. I have located a facility in Orlando, Florida, and another in New Jersey which can do it.

This brings up another novel scheme. The Oakland, California Unified School District is now operating a "Cable" Television Station on Channel 13, KDON. It is soliciting "previews" that would be put on the air. A representative even went so far as to make a long distance call to me to solicit such "previews". My response was a little unkind. I suggested that they should be able to convene a preview committee to make purchase evaluations . . . just like everybody else. Further, if they haven't bought anything from us in the last fourteen years we've been dealing with each other, they must not be a very hot prospect.

One important point is that there is nothing irregular in authorized dubbing off-the-air or in a dubbing facility. For instance, we have just finished producing a series of films for a client which intends to use them in their local school system. This client paid the production fee and owns the distribution rights. They can pull any number of prints.

As one of my hobbies, I am Vice President of the Independent Media Producers Association, and chairman of its Distribution Committee. This is a relatively small new group of independent media producers who mobilized to assist in the orientation or perhaps reorientation of the new basic ordering agreement system for government procurement of production services a very complicated subject. At its most recent meeting of its Board of Directors, the subject of unauthorized off-air dubbing was dicussed.

The most cogent comment which was made is that when a producer of speculative audiovisuals has put his own money on the line . . . he should have the option to determine how they will be used. "Fair use" should not be a polite term for "piracy".

My personal reaction is that if things get too lenient I will have to get out of this business and cease making educational films speculatively that other firms might do the same thing. Perhaps we'd never be missed.

However, I think there is a potential reasonable solution. It may not be a split down the middle . . . but it could satisfy both parties. And, here parenthetically, it must be mentioned that the good intentions and the excellent performance of educators is beyond challenge. What is more ideal than education. How can earnest teachers, curriculum people, and materials specialists be severely criticized if they try to overcome budget limitations with ingenuity.

I suggest that it is more practical for "good faith" negotiations to be undertaken in an effort to develop a reasonable solution which pleases both parties and injures neither unduly. This is far better than inciting a riot and barraging Congress with demands. It is fairly obvious that a solution might be more sensitively arrived at by quiet negotiations. While I don't want to sound like Goody-Goody-Two-Shoes to all you sophisticated people, let's try it . . . and remember the phrase "good faith" negotiations.

Mr. LEHMAN. Thank you, Mr. Finley.

Next, we will move on to a little larger scale enterprise—in fact, an enterprise with very many vice presidents—and we have several in

Washington. And I am now having the opportunity to meet some of the New York people.

Mr. James Bouras, who is the vice president of the Motion Picture Association of America, will present the point of view of the various enterprises represented by that association.

TESTIMONY OF JAMES BOURAS, VICE PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. BOURAS. Thank you, Mr. Lehman.

The Motion Picture Association of America, for those of you who are unfamiliar with it, is a trade association for several large motion picture companies—Columbia Pictures, Walt Disney Productions, MGM, Paramount Pictures, Twentieth-Century Fox, United Artists, Universal, Warner Brothers, Allied Artists, and AVCO Embassy, and—I should have 10 there. Excuse me if I inadvertently forgot them.

We have all been called here today by Chairman Kastenmeier and Congressman Railsback to discuss an unresolved issue in the Copyright Act of 1976, which is the extent to which the fair use doctrine applies in the context of unauthorized video taping off the air.

I think the letter which we all received is instructive. It says, and it quotes from the House report, "The committee believes that the fair use doctrine has some limited application in this area."

I was not present at the Airlie House Conference held in 1977, but I have read the transcript. And if there is anything which emerges clearly from it, it is that whatever definition of "fair use" is arrived at, it is not an answer to this problem.

Whatever our differences of opinion may be in that area, the Airlie House Conference clearly shows there are substantial areas beyond fair use as someone put it at that conference, where there is an educational desire for material and there clearly is not fair use.

Accordingly, it is the view of the motion picture companies that, even though the letter inviting us here today spoke in terms of the limited subject of hopefully arriving at some guidelines for the application of the fair use doctrine in this area, that the ensuing discussions in the months to come should not be circumscribed by that letter.

Rather, we think we should consider the problem in toto and that whatever differences there may be with respect to fair use, there are clearly areas beyond fair use in which we would like to work with the educational community to see if some solutions can be found.

In particular, the motion picture companies are willing to work with other copyright proprietors, with all educators, to see if some mechanism can be devised—and I hesitate to use the word "clearinghouse," because that has been belabored, but I guess it is as good a word as any—some mechanism can be devised by which educators can quickly, expeditiously, and conclusively determine whether or not they can obtain permission to use certain kinds of copyrighted material.

Now as I said, we are a trade association. We have 10 member companies. Several of the other groups here are trade associations with individual members. And clearly, each of their members must, even assuming some clearinghouse is set up, reserve the right to determine which of its copyrighted products will be subject to licensing under that sort of scheme.

But as I said, we feel, and feel rather strongly, that everything that has been said today convinces us that the fair use doctrine, although we may disagree as to how far it goes, at best it has limited application in this area.

And quite frankly, it is the view of the motion picture companies that the taping of entire copyrighted works off the air is an infringement and not a fair use.

I would just like to mention a couple of other matters rather quickly. They are not necessarily related, but we would like to make our points clear.

One is the term "broadcasting." The Airlie House Conference, the House Committee report, speaks in terms of "videotaping off-the-air television broadcasts." It is our understanding of the term "broadcast" that it means precisely what the FCC says it means—namely, conventional television—and that it does not include pay television in whatever form it takes, or satellite transmissions, or various other methods which may be employed in the future.

We are speaking purely about off-air recording of broadcasts.

Second, we think that the discussions in the months to come in terms of motion pictures to which our members own copyrights must also take into account the underlying copyrights held by third persons, authors, musicians, rights possessed by unions and guilds. And we hope in the committees that are appointed to meet in the months to come, that representatives of these organizations will be included.

Third, although it is not really the subject of this conference—which is off-the-air recording—I think we want to express our great concern, as Mr. Finley expressed his, about a growing phenomenon which we see particularly in certain areas of higher education where films are licensed and then duplicated—in small part, print-to-print transfers—but in growing and larger part, film-to-tape transfers. We regard that as an outright infringement. And we want to be clear about it.

Fourth, we think that in terms of the discussions which will be held in the months to come, it will be extremely useful to all parties if they brought to bear in those meetings all possible facts and data that they can. We think it would be extremely unproductive to discuss things in a vaccum.

And from our point of view, and I am here to express our point of view, we think it would be extremely useful if in those meetings representatives of the educational community could come with material dealing with the extent to which video machinery has permeated the educational system, the various types of equipment as well as the various uses to which the material is put.

And I am particularly concerned about differences between face-to-face use in video classrooms, and use of the material on a closed-circuit system throughout a school system, or even, I am told, in some cases certain educational institutions having low-power authority from the FCC for low-power broadcasting.

All of these questions are going to bear on how successful and productive the discussions are in the months to come.

I don't mean to sound at all belligerent or uncooperative. We are very happy to be here, and we look forward to the meetings in the months to come.

There are certain differences. We hope that in a candid assessment of what those differences are, and a discussion of them, we can resolve a lot of the troublesome issues in the area. But our basic point is that fair use and fair use alone is not a solution in this area, and that any discussions in the months to come must consider the problem in toto.

Thank you. [Applause.]

Mr. MOONEY. Thank you.

Just joining us is the newest member of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, and a member I am sure many of you are already familiar with.

And like other new members of our subcommittee, although he was on the full committee during the copyright revision and was extremely helpful, he has not spent a great deal of time, like Chairman Kastenmeier, in reviewing all the details of copyright.

I would like to introduce to you Congressman Carlos Moorhead of California. [Applause.]

We certainly appreciate the Congressman stopping by for a few minutes, and he is gathering material and I am sure is looking forward to reading the transcript that we make here today.

Mr. LEHMAN. Next, I would like to proceed to a series of speakers representing commercial broadcasting. And first, we will hear from Mr. James Popham from the National Association of Broadcasters.

And subsequent to that, we will hear from each of the three commercial networks separately.

The National Association of Broadcasters, of course, represents those individual networks, but it also represents individual television broadcast companies throughout the United States.

Mr. Popham?

TESTIMONY OF JAMES J. POPHAM ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. POPHAM. Thank you very much.

This is more or less a prepared statement which is available. It is like the pot of coffee over there. There were not enough copies to bring and put on the table and start a riot. If you would like a copy, if you can't wait for the transcript to be published, simply call or write our office or give me your card sometime today and we will be happy to send one.

The NAB, as the National Association of Broadcasters generally is known, is the major trade association of the broadcast industry. Presently, NAB's membership includes 569 of the Nation's broadcast television stations and all nationwide commercial television broadcast networks.

We thank you for the opportunity to present our views today.

NAB has joined in previous attempts to resolve the many questions arising from off-air recording of broadcast programing within the legal framework erected by the Copyright Revision Act of 1976. I don't think I have to tell you these efforts have been unsuccessful, and I would be less than candid if I indicated that we continue to confront anything less than a highly controversial matter and a rather formidable task in attempting to resolve it.

Nonetheless, we appreciate the invitation to join in today's discussions and hope that they will engender mutual understanding and respect for one another's needs and interests. So let me emphasize that we come here today not only to speak, but also to listen.

I would like to focus this morning primarily on the interests of local television stations. Representatives of the three major commercial television networks are also here today, and confining my remarks to the interests of local television stations will serve to prevent needless repetition this morning.

To date, I think very little attention has been paid to local stations when the problem of off-air recording has been discussed. This oversight, while benign and to a degree understandable, should not continue.

Local broadcast stations, like any other copyright proprietors, maintain a vital and constantly growing interest in protecting their works from unauthorized duplication and reuse.

Furthermore, local stations themselves are users of program product produced by others. If the value of that product is diluted by unauthorized use by others, then the station as well as the producer will suffer.

On the other hand, local broadcasters take justifiable pride in their locally produced programing, broadcast of which often contributes substantially to their community's knowledge and understanding of local happenings and concerns.

Recognizing the continuing value of their programing to promotion of community awareness and involvement, local broadcasters have little desire to withhold their programing from those who wish to record and replay it for purposes beneficial to community interests—including, of course, the education of the community's young.

In fact, some stations gladly furnish tapes, monitors, and station personnel to community groups seeking a replay of a local program of particular interest.

I would also point out that NAB was among the parties which were instrumental in securing a change in proposed Copyright Office regulations to permit stations and networks to authorize or license off-air recording of their programing for educational use without complying with burdensome deposit and registration requirements.

Our concern was that licensing or authorizations might be considered publication of these works, thus necessitating deposit and registration.

Faced with these requirements, many stations might well have denied permission to educators who wished to record and replay their programs. Fortunately, the Copyright Office considered our concerns valid and exempted such programs from the mandatory deposit requirements.

Thus, it is our hope that broadcast programs can be made available educational uses to the greatest extent possible, but only in a manner which preserves the right of broadcasters as both owners and users of copyrighted works.

I would like to elaborate on that.

I mentioned earlier that the lack of attention to local broadcasters' concerns was understandable. Ineed, local broadcasters are the producers of only a limited portion of the programing on their stations. Most programing viewed on television stations is either furnished by a national network or purchased from a syndicator of programing produced by others.

Furthermore, interest in utilizing broadcast programing for educational purposes has centered on network and syndicated programing. So why are local broadcasters' concerns suddenly worthy of more prominence?

First of all, we anticipate increasing interest in use of local broadcast programing for educational purposes. This is particularly true with respect to the increasing amount of local children's programing produced and broadcast by individual stations.

Additionally, the continuing improvement of broadcast coverage of local news and public affairs resulting from widespread utilization of electronic news gathering, ENG, and the entry of many stations into investigative reporting will make locally produced programing an increasingly valuable resource for the educator as well as the public.

Furthermore, the ongoing proliferation of video-cassette recorders, VCR's, will increase the capacity of educators to tape broadcast programs and lead to demands for taping of a wider variety of programs.

Thus, future off-air recording probably will not be as confined to national network distributed programing as it is today.

Also, increasing public awareness and use of VCR's will enhance its acceptability and effectiveness as a teaching tool, particularly as more teachers and educators learn to integrate video technology into their classroom teaching.

I point out here that NAB has been active recently in encouraging use of video in the classroom. And for years, the Television Information Office has published what is known as "The Teachers' Guide to Television."

So we do foresee increasing interest in educational taping of local programing resulting from the greater educational value of that programing, the expanded capacity of educational institutions to record and utilize broadcast programs, and the enhanced acceptance of "television in the classroom" by educators and the public alike.

The second reason local broadcasters are concerned about off-air taping of television programing is their need to retain control of the uses of their works. This need arises from a variety of considerations, many of which network representatives will describe in some detail. So I am only going to allude to them rather briefly and observe that they are generally equally valid concerns with respect to local programs.

Local stations must retain their right to prevent unauthorized uses of their programs to protect themselves from legal liability. Examples of cases where continuing unauthorized exposure of a local station program might increase their liability include programs containing defamatory statements, invasions of privacy, and ironically enough, copyright infringements.

Stations also must be able to protect against misuses of their programing. An example of possible misuse would include editing to distort the content or meaning of a program, thereby placing the station, its personnel, or program participants in a false light.

We are not suggesting that the educational community makes a habit of snipping, clipping, and reassembling television programing for less than laudable purposes. We simply wish to point out that once a station cannot determine who may make additional uses of its program product, its ability to protect itself and others from such misuse is lost.

Local stations also must concern themselves with the rights of their employees and other parties connected with their programing. Writers, producers, directors, designers, and on-air personnel are vitally concerned with maintaining the integrity of their work in the public eye. I suspect you will hear more about that this afternoon.

Stations which cannot control additional uses of their programs cannot give any assurance to their programing personnel that instances of damaging misuse, much less legal liability, would not occur.

Finally—and this I would like to describe in some detail—extensive unauthorized off-air taping destroys a market for the station copyright owner.

Candidly, the market to which I refer barely exists at the present time. We do not now see broadcast stations engaged in extensive licensing of their works for educational purposes. What we envision, however, is a competitive milieu in which broadcast stations will find it not only desirable but necessary to develop and exploit other markets.

The entire telecommunications industry is entering a new era of competition. Broadcasters who have competed vigorously with each other increasingly will find themselves competing with other media for audience.

Cable television is growing steadily and providing a plethora of competitive program services. Satellites, subscription television, the multipoint distribution service, translators, low power television stations, optical communications, videocassettes, videodiscs, and technologies we may not even know about today, all portend more competition for broadcasters.

This will leave broadcasters with a smaller slice of the audience pie and reduce the revenue potential for sale of advertising time. Obviously, it will create a tremendous incentive to find other pies for their sustenance.

One such "pie" or market is the market for videocassette and videodisc copies of broadcast programs. We think it far from inconceivable that local broadcast stations may be offering tape or disc copies of their programing for sale in the not-too-distant future.

Local news, public affairs, and children's programs are expensive to produce. To continue to improve such programing or even to maintain the current level of quality, broadcasters facing a declining ad revenue potential must be able to develop other means of support. Sale or lease of recordings of these programs is one such source of additional revenue.

If our crystal ball is correct, educators will constitute a significant portion of the market for these program copies.

We are concerned that unauthorized off-air taping of local programs in the near term will destroy that market before it has a chance to develop. Yet, this market may become critical to the continued creative efforts of local broadcasters in providing vital news, public affairs, and children's programing. A copyright law such as ours, premised on the promotion of creative efforts, hardly can countenance dilution or destruction of that market.

I also have mentioned that we are concerned as users of copyrighted material. To the extent that programing furnished by networks or purchased by syndicators is exposed in a market prior to local broadcast, its value to the local station diminishes.

Simply put, the more potential viewers who have seen a program before it is broadcast, the less audience potential the show will have when it is broadcast by the local stations.

Ultimately, of course, stations may insist on lower prices—or higher network compensation—for the rights to broadcast these programs; and the producer, syndicator, or network bears the loss.

If the producer has made a conscious decision to authorize and gain recompense for prebroadcast uses, then perhaps the station could attempt to protect itself by seeking exclusivity against such uses or purchasing a different program.

On the other hand, if the station and producer are helpless to prevent pre-broadcast exposure, then one must absorb the resultant loss. In either case, again the function of the copyright law to promote creative efforts is undermined.

Lastly, I must admit that authorizing or licensing of educational uses of even local broadcast programing may not occur overnight.

While we detect no overwhelming or widespread desire in the industry to withhold product, stations will face hurdles which may prevent supply from responding immediately to demand.

Stations often include copyrighted works in their programs—music, scripts, graphics, et cetera. The copyright owners of these works may or may not be willing to permit stations to authorize off-air taping by educators.

Similarly, existing union agreements and talent contracts may not contemplate such additional licensing. We are hopeful that adjustments can be made, but they will take time.

Again, I would like to thank you for the opportunity to speak today, and also for the opportunity to listen to the remainder of the day.

The road ahead, as we said, is not a particularly easy one, but NAB does remain willing and able to participate as it considers necessary or desirable in the hope of resolving some of what clearly is a critical issue to all of us.

Thank you. [Applause.]

Mr. **Lehman**. Now, we will proceed to a series of very short presentations from the commercial networks.

Mr. Popham's presentation primarily dealth with, as you heard, problems of local stations. And we will start with, I guess, the network highest in the ratings today, which is appropriate, ABC. Donna Sessa, director of ABC media concepts, will speak for that network.

[Prepared statement of James J. Popham follows:]

Statement of James J. Popham, Assistant General Counsel, National Association of Broadcasters

Mr. Chairman, my name is James Popham. I am Assistant General Counsel for the National Association of Broadcasters. NAB, as you know, is the major trade association of the broadcast industry. Presently, NAB's membership includes 569 of the Nation's broadcast television stations and all nationwide commercial television broadcast networks. We thank you for the opportunity to present our views today.

NAB has joined in previous attempts to resolve the many questions arising from off-air recording of broadcast programing within the legal framework erected by the Copyright Revision Act of 1976. I don't think I have to tell you these efforts have been unsuccessful, and I would be less than candid if I indicated that we continue to confront anything less than a highly controversial matter and a rather formidable task in attempting to resolve it.

Nonetheless, we appreciate the invitation to join in today's discussions and hope that they will engender mutual understanding and respect for one another's needs and interests. So let me emphasize that we come here today not only to speak, but also to listen.

My remarks today will focus primarily on the interests of local television stations. Representatives of the three major commercial television networks also are here today, and, confining my remarks to the interests of local television stations will serve to prevent needless repetition this morning.

To date, I think, very little attention has been paid to local stations when the problem of off-air recording has been discussed. This oversight, while benign and, to a degree, understandable, should not continue.

Local broadcast stations, like any other copyright proprietors, maintain a vital and constantly growing interest in protecting their works from unauthorized duplication and reuse.

Furthermore, local stations themselves are users of program product produced by others. If the value of that product is diluted by unauthorized use by others, then the station as well as the producer will suffer.

On the other hand, local broadcasters take justifiable pride in their locally produced programing, broadcast of which often contributes substantially to their community's knowledge and understanding of local happenings and concerns. Recognizing the continuing value of their programing to promotion of community awareness and involvement, local broadcasters have little desire to withhold their programing from those who wish to record and replay it for purposes beneficial to community interests (including, of course, the education of the community's young).

In fact, some stations gladly furnish tapes, monitors and station personnel to community groups seeking a replay of a local program of particular interest. In securing a change in proposed copyright office regulations to permit stations and networks to authorize or license off-air recording of their programing for educational use without complying with burdensome deposit and registration requirements. Our concern was that such licensing or authorizations might be considered publication of these works, thus necessitating deposit and registration,

Faced with these requirements, many stations might well have denied permission to educators who wished to record and replay their programs. Fortunately, the Copyright Office considered our concerns valid and exempted such programs from the mandatory deposit requirements.

Thus, it is our hope that broadcast programs can be made available for educational uses to the greatest extent possible, but only in a manner which preserves the right of broadcasters as both owners and users of copyrighted works.

I would like to elaborate on that.

I mentioned earlier that the lack of attention to local broadcasters concerns was understandable. Indeed, local broadcasters are the producers of only a limited portion of the programing broadcast on their stations. Most programing viewed on television stations is either furnished by a national network or purchased from a syndicator of programing produced by others.

Furthermore, interest in utilizing broadcast programing for educational purposes has centered on network and syndicated programing. So why are local broadcasters' concerns suddenly worthy of more prominence?

First of all, we anticipate increasing interest in use of local broadcast programing for educational purposes. This is particularly true with respect to the increasing amount of local childrens' programing produced and broadcast by individual stations.

Additionally, the continuing improvement of broadcast coverage of local news and public affairs resulting from widespread utilization of electronic news gathering (ENG) and the entry of many stations into investigative reporting will make locally produced programing an increasingly valuable resource for the educator as well as the public.

Furthermore, the on-going proliferation of videocassette recorders (VCCR's) will increase the capacity of ecucators to tape broadcast programs and lead to demands for taping of a wider variety of programs. Thus, future off-air recording probably will not be as confined to national network distributed programing as it is today.

Also, increasing public awareness and use of VCR's will enhance its acceptability and effectiveness as a teaching tool, particularly, as more teachers and educators learn to integrate video technology into their classroom teaching.

So we do foresee increasing interest in educational taping of local programing resulting from the greater educational value of that programing, the expanded capacity of educational institutions to record and utilize broadcast programs, and the enhanced acceptance of "television in the classroom" by educators and the public alike.

The second reason local broadcasters are concerned about off-air taping of television programing is their need to retain control of the uses of their works. This need arises from a variety of considerations, many of which network representatives will describe in some detail.

Local stations must retain their right to prevent unauthorized uses of their programs to protect themselves from legal liability. Examples of cases where continuing unauthorized exposure of a local station program might increase their liability include programs containing defamatory statements, invasions of privacy, and, ironically enough, copyright infringements.

Stations also must be able to protect against misuses of their programing. An example of possible misuse would include editing to distort the content or meaning of a program, thereby placing the station, its personnel or program participants in a false light.

We are not suggesting that the educational community makes a habit of snipping, clipping, and reassembling television programing for less than laudable purposes. We simply wish to point out that once a station cannot determine who may make additional uses of its program product, its ability to protect itself and others from such misuse is lost.

Local stations also must concern themselves with the rights of their employees and other parties connected with their programing. Writers, producers, directors, designers, and on-air personnel are vitally concerned with maintaining the integrity of their work in the public eye. Stations which cannot control additional uses of their programs cannot give any assurance to their programing personnel that instances of damaging misuse, much less legal liability would not occur.

Finally—and this I would like to describe in some detail—extensive unauthorized off-air taping destroys a market for the station-copyright owner. Candidly, the market to which I refer barely exists at the present time. We do not now see broadcast stations engaged in extensive licensing of their works for educational purposes. What we envision, however, is a competitive milieu in which broadcast stations will find it not only desirable, but necessary to develop and exploit other markets.

The entire telecommunications industry is entering a new era of competition. Broadcasters who have competed vigorously with each other increasingly will find themselves competing with other media for audience.

Cable television is growing steadily and providing a plethora of competitive program services. Satellites, subscription television, the multipoint distribution service, translators, low power television stations, optical communications, videocassettes, videodiscs, and technologies we may not even know about today, all portend more competition for broadcasters. This will leave broadcasters with a smaller slice of the audience pie and reduce the revenue potential for sale of advertising time. Obviously, it will create a tremendous incentive to find other pies for their sustenance.

One such "pie" or market is the market for videocassette and videodisc copies of broadcast programs. We think it far from inconceivable that local broadcaxt stations may be offering tape or disc copies of their programing for sale in the not too distant future.

Local news, public affairs, and children's programs are expensive to produce. To continue to improve such programing or even to maintain the current level of quality, broadcasters facing a declining ad revenue potential must be able to develop other means of support. Sale or lease of recordings of these programs is one such source of additional revenue.

If our crystal ball is correct, educators will constitute a significant proportion of the market for these program copies. We are concerned that unauthorized off-air taping of local programs in the near term will destroy that market before it has a chance to develop. Yet, this market may become critical to the continued creative efforts of local broadcasters in providing vital news, public affairs, and children's programing. A copyright law such as ours, premised on the promotion of creative efforts, hardly can countenance dilution or destruction of that market.

I also have mentioned that we are concerned as users of copyrighted material. To the extent that programing furnished by networks or purchased by syndicators is exposed in a market prior to local broadcast, its value to the local station diminishes.

Simply put, the more potential viewers who have seen a program before it is broadcast, the less the audience potential the show will have when it is broadcast by the local stations.

Ultimately, of course, stations may insist on lower prices (or higher network compensation) for the rights to broadcast these programs; and the producer, syndicator or network bears the loss. If the producer has made a conscious decision to authorize and gain recompense for prebroadcast uses, then, perhaps, the station could attept to protect itself by seeking exclusivity against such uses of purchasing a different program.

On the other hand, if the station and producer are helpless to prevent prebroadcast exposure, then one must absorb the resultant loss. In either case, the function of the copyright law to promote creative efforts is undermined.

Lastly, I must admit that authorizing or licensing of educational uses of even local broadcast programing may not occur overnight. While we detect no overwhelming or widespread desire in the industry to withold product, stations will face hurdles which may prevent supply from responding immediately to demand. Stations often incluede copyrighted works in their programs—music, scripts, graphics, etc. The copyright owners of these works may or may not be willing to permit stations to authorize off-air taping by educators. Similarly, existing union graphics, etc. The copyright owners of these works may or may not be iwlling to permit stations to authorize off-air taping by educators. Similarly, existing union agreements and talent contracts may not contemplate such additional licensing. We are hopeful that adjustments can be made, but they will take time.

Again, I would like to thank you for the opportunity to speak today and, also, for the opportunity to listen to the remainder of the day.

TESTIMONY OF DONNA SESSA ON BEHALF OF ABC-TV

Ms. Sessa. My name is Donna Sessa and I am in charge of ABC Media Concepts, which is the educational subsidiary of the American Broadcasting Cos., Inc.

My objective this morning is to outline some of the unique problems which characterize off-the-air taping of broadcast programs for educational purposes.

A television network both distributes and produces copyrighted programs. It is therefore both an exhibitor of copyrighted works and a creator of such works.

As an exhibitor of programs, networks are essentially a vehicle to provide the filmed or taped show to the public. If the show has been created and produced by someone else, the network only has the rights to promote and subsequently broadcast the program.

In such circumstances, not only does the network not have any copyright interest in the program, it has no ability to deal with copyright questions, except to the extent the network is normally bound by contract to commit no act that would jeopardize the owner's copyright.

Therefore, ABC is simply not in a position to grant licensing or taping requests for such programs.

As to the limited number of programs which ABC produces in-house, and does own the copyright—programs such as "Good Morning, America" segments, the ABC "News Close-Up" documentaries, newscasts and sports programs, "Kids Are People, Too" segments, and "20/20"—ABC contracts with writers, directors, and talent to guarantee to these persons certain compensation for their work and for ABC to use the finished product. Under these arrangements, certain rights are also reserved to these persons to utilize their work elsewhere or to be compensated if ABC makes other types of uses of their work.

Under certain collective bargaining agreements with the Writers Guild, ABC has contractually obligated itself to protect the literary material for copyright purposes and to take no action to cause or permit such material to become part of the public domain.

When a television program is copied and supplied to a marketplace other than television release, the rights reserved to the writer, actor, or director may call for additional payments. Sale or other supply of a documentary to the educational market, for example, generates additional payments to writers.

A television program is clearly not like a book or record which can be casually examined before purchase—and, in fact, is typically purchased in its entirety before being used for any educational or like purpose.

This is why we believe that judgments as to what, if any, "fair use" of such programing may be appropriate, can only be considered after arrangements have been made for the first acquisition of the complete television program.

Recognizing the inherent educational value of much television programing, and acting within the limits imposed, ABC has long sought to cooperate with the educational community. For example, ABC Media Concepts, a wholly owned subsidiary, is the central media resource for educators seeking access to programs televised on the ABC Television Network and on its owned and operated stations.

Through its own distribution efforts and the efforts of its licensed distributors, ABC Media Concepts makes many programs available. Solely owned and produced programs are available for rental and for purchase in many formats: 16mm, videocassette, and filmstrip, Available programing includes hard news broadcasts, documentaries. and public affairs, sports, children's, and special features.

Also, ABC now provides for off-the-air licensing of its hard newscasts.

In addition, we recently began supplying educators with appropriate lists—names and addresses—of copyright holders for programs not produced by ABC, although televised by the ABC Television Network or its owned and operated stations.

ABC has also worked closely with the educational community to better utilize television in the learning process, including efforts to increase both reading skill levels and reading interest.

ABC has designed a children's "Be a TV Reviewer" project to motivate children to write and to think critically about television programing, and has underwritten a project to create a social studies or language arts course for grades 3–5 which will enable children to become more intelligent and discriminating viewers.

These examples of coordination and cooperation with the educational community reflect ABC's widespread interest in improving the learning process—within the limits imposed.

I thank you very much. [Applause.]

[Prepared statement of Donna Sessa follows:]

STATEMENT OF DONNA SESSA, DIRECTOR OF ABC MEDIA CONCEPTS, ABC, INC.

My name is Donna Sessa and I am Director of ABC Media Concepts, the educational subsidiary of ABC, Inc. My objective this morning is to outline some of the unique problems which characterize off-the-air taping of broadcast programs for educational purposes.

A television network both distributes and produces copyrighted programs. It is therefore both an exhibitor of copyrighted works and a creator of such works.

As an exhibitor of programs, networks are essentially a vehicle to provide the filmed or taped show to the public. If the show has been created and produced by someone else, the network only has the rights to promote and subsequently broadcast the program.

In such circumstances, not only does the network not have any copyright interest in the program, it has no ability to deal with copyright questions, except to the extent the network is normally bound by contract to commit no act that would jeopardize the owner's copyright. Therefore, ABC is simply not in a position to grant licensing or taping requests for such programs.

As to the limited number of programs which ABC produces inhouse, and does own the copyright—programs such as Good Morning America segments, the ABC News Close-up documentaries, newscasts and sports programs, Kids Are People Too segments, and 20/20—ABC contracts with writers, directors and talent to guarantee to these persons certain compensation for their work and for ABC to use the finished product. Under these arrangements certain rights are also reserved to these persons to utilize their work elsewhere or to be compensated if ABC makes other types of uses of their work.

Under certain collective bargaining agreements with the Writers Guild, ABC has contractually obligated itself to protect the literary material for copyright purposes and to take no action to cause or permit such material to become part of the public domain.

When a television program is copied and supplied to a marketplace other than television release, the rights reserved to the writer, actor or director may call for additional payments. Sale or other supply of a documentary to the educational market for example, generates additional payments to writers.

A television program is clearly not like a book or record which can be casually examined before purchase—and, in fact, is typically purchased in its entirety before being used for any educational or like purpose. This is why we believe that judgments as to what, if any, "fair use" of such programming may be appropriate, can only be considered after arrangements have been made for the first acquisition of the complete television program.

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These examples of coordination and cooperation with the educational community reflect ABC's widespread interest in improving the learning process—within the limits imposed.

I thank you very much.

Mr. LEHMAN. Thank you.

Next, we will move on to CBS, and Joe Bellon will make a presentation for CBS.

TESTIMONY OF JOE BELLON, CBS

Mr. BELLON. I think that CBS wisely anticipated Mr. Lehman's prior remarks about the ratings gotten us by ABC in sending a person from the news division.

And I am proud to say that we at CBS News feel that with Walter Cronkite and "60 Minutes," we have somewhat of a leadership position in the news area.

For nearly 20 years, CBS has been making many of its public affairs broadcasts available to various educational film and tape distributors, who, in turn, rent or sell them to school systems and libraries for nonbroadcast exhibition.

Many of our public affairs broadcasts not licensed to distributors are available directly from CBS.

In some cases, however, because of rights prohibitions or legal considerations, we cannot release these broadcasts.

And with respect to entertainment programs, in practically all cases, CBS obtains only broadcasting rights, and therefore, CBS cannot make these programs available for nonbroadcast use.

The process of clearing rights for nonbroadcast use and licensing these broadcasts to distributors is administered by a department in CBS whose activities are akin to the subsidiary rights or licensing departments at publishing companies or motion picture corporations. We regard this as a proper and beneficial business activity.

Likewise, those educational distributors who acquire our broadcasts are also engaged in a worthwhile business enterprise.

That's why, since 1957, this CBS licensing department has released more than 600 broadcasts to distributors for nontheatrical exhibition, including such series as "The Twentieth Century," "CBS Reports," "Of Black America," segments of "60 Minutes," plus many other outstanding CBS News documentaries.

I know that some of you are quite familiar with this licensing function at CBS and at the other networks. But we receive plenty of mail and telephone inquiries from educators, especially those who have recently discovered the new video technology, that suggest complete unawareness of this business activity. I believe that this lack of knowledge is at the root of many of the problems we are having with unauthorized off-the-air taping and with some proposals of educators who want special concessions in the copyright law.

I suppose the attitude is: What harm are we doing by taping these programs off the air, being totally unaware of the ongoing, prolonged business activity in this area.

Now having said that, let me now try to dispel some other misconceptions that we encounter in our discussions with educators on the subject of off-air recording.

First, many persons, unfamiliar with television production and the profession of broadcast journalism, do not comprehend television news and public affairs programs as "copyrighted works," like books which are indeed protected under the U.S. copyright law.

I know that those of you who are aware of how these programs are produced would agree that the skill and creativity involved in the production of these broadcasts equals or exceeds that of authors of books and other printed matter.

Another misconception is that because television broadcasts are transmitted over the "public airwaves," they thereby lose some copyright protection and thus may be freely used by those who record these broadcasts off the air.

Somehow, similar arguments are not made with respect to textbooks or other educational materials that schools purchase and are delivered to schools over "public" highways or by means of the U.S. Postal Service.

Let me summarize the position of CBS. We believe that our broadcasts are indeed creative works protected by copryight. These broadcasts are, have been, and will continue to be licensed for nonbroadcast use in schools, and other institutions and eventually for inhome use.

We believe that this is a proper business activity similar to the sale of books and the licensing of theatrical motion pictures to schools and that any activity, such as unauthorized off-the-air taping, which interferes with this legitimate business operation is a clear violation of the law.

Moreover, it is our understanding of the law that the concept of "fair use" does not condone acts by users which would injure or restrict a proper business activity of the copyright proprietor.

Nevertheless, I do not want to state our position without indicating our sensitivity to the interests of educators in reasonable and economically feasible access to our broadcasts,

I have some suggestions which, because of time restrictions, I will only briefly outline at this time:

One: School systems should work through statewide or regional consortia to obtain video cassette copies of network broadcasts which these central agencies either have been authorized to make, or which they have acquired from a legitimate licensing authority. The networks and their distributors should encourage these arrangements which can very substantially reduce the cost of obtaining network programs. Some of this is happening now.

I know many of you are active in this area, and I commend you for your activities in this respect. It will provide inexpensive programing to educators if we give it a chance to work.

Two: The broadcast networks should continue to work closely with the major educational organizations such as AECT and others, so that there is proper dissemination of information on how to lawfully obtain copies of network programs.

Three: Educators should be aware of various policies at CBS and other networks which permit, under license, off-air taping of daily hard news broadcasts. There are very nominal license fees involved to obtain access to this very valuable news material.

I urge educators to exercise their imagination on the many ways this current news material can be utilized effectively in the classroom.

I administer a program, this program. And if any of you are interested in finding the results of our licensing activities, you can see me at the break.

These above-mentioned positive approaches should be the focus of your desire to obtain access to network programing, especially during the next 5 years. They will yield many more results and involve far fewer disputes than arise from an attitude which constantly dwells on "how much can we get away with under the fair use doctrine?"

At some point in the future, when the video player population in schools comes close to the 16-millimeter projector population, we should come together and reassess the question of using broadcasting as a delivery system for educational materials.

At that point, there may be some economic feasibility for an off-the-air licensing policy for many more of our broadcasts.

Then, again, the advent of the video disk may provide new, inexpensive ways of obtaining video instructional materials. Until then, I urge that we all act responsibily—respecting each other's rights and needs and looking for ways of providing machinery for taking advantage of the new video technology.

Let us not now rush to judgment.

Thank you.

[Applause.]

[Prepared statement of Joseph P. Bellon follows:]

Statement of Joseph P. Bellon, Vice President, Resources Development and Production, CBS News, at Off-the-Air Recording Conference

For nearly 20 years, CBS has been making many of its public affairs broadcasts available to various educational film and tape distributors, who, in turn, rent or sell them to school systems and libraries for nonbroadcast exhibition. Many of our public affairs broadcasts not licensed to distributors are available directly from CBS.

In some cases we have withheld our broadcasts from distribution to schools and libraries because of legal or contractual prohibitions. Also, with respect to entertainment programs, in practically all cases, CBS obtains only broadcasting rights, and therefore CBS cannot make these programs available for non-broadcast use.

The process of clearing rights for non-broadcast use and licensing these broadcasts to distributors is administered by a department in CBS whose activities are akin to the subsidiary rights or licensing departments at publishing companies or motion picture corporations. We regard this as a proper and beneficial business activity.

Likewise, those educational distributors who acquire our broadcasts are also engaged in a worthwhile business enterprise.

That's why since 1957, this CBS licensing department has released more than 600 broadcasts to distributors for non-theatrical exhibition, including such series as the Twentieth Century, CBS Reports, of Black America, segments of 60 Minutes, plus many other outstanding CBS News documentaries.

I know that some of you are quite familiar with this licensing function at CBS and at the other networks. But we receive plenty of mail and telephone inquiries from educators, especially those who have recently discovered the new video technology, that suggest complete unawareness of this business activity. I believe that this lack of knowledge is at the root of many of the problems we are having with unauthorized off-the-air taping and with some proposals of educators who want special concessions in the copyright law.

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Moreover, it is our understanding of the law that the concept of "fair use" does not condone acts by users which would injure or restrict a proper business activity of the copyright proprietor.

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Then again, the advent of the video disk may provide new, inexpensive, ways of obtaining video instructional materials. Until then, I urge that we all act responsibly—respecting each others rights and needs and looking for ways of providing machinery for taking advantage of the new video technology. Let us not now rush to judgment.

Thank you.

Mr. LEHMAN. Thank you, Mr. Bellon.

Our last network speaker will be Bob Hynes from NBC. And Bob, unlike the other speakers, is the Washington representative of NBC and handles the governmental affairs matters, rather than working in the licensing departments.

TESTIMONY OF ROBERT HYNES, NATIONAL BROADCASTING CO.

Mr. HYNES. Thank you, Bruce.

I now realize the depth of NBC's problems. It is bad enough when you are No. 3 in the ratings, but it is a heck of a note to realize that what we consider a temporary phenomenon turns out to be No. 3 in the subcommittee.

On behalf of the National Broadcasting Co., I would like to take this opportunity to thank Chairman Kastenmeier, Congressman Railsback, and every member of the subcommittee and the Copyright Office for arranging this conference and to give us the opportunity to share with you NBC's experience in making our programs available to educational institutions.

First, let me explain a few things about NBC's programing. I think they have been touched on, but let me make it clear that we produce as a company the network news programs, documentaries, and public affairs programs. And we own the copyrights to it.

Almost all of the popular entertainment programing that is carried by the network is supplied to us by independent program producers. Our customary arrangement with these owners merely grants NBC exclusive rights to broadcast programs in the United States for one or two showings.

Sports programs carried by the network are furnished to us under similar limited broadcast licenses by the various sports leagues and by individual sports programers.

As a result of these arrangements, rights to entertainment and sports programs can only be obtained from these owners in packages.

NBC cannot enter into arrangements to license the use of these programs without getting the prior consent of the rights holders.

I mention this because although these programs always carry the names of the packager and the owner, many educators seem to be unaware of this fact—the fact that we do not have the right to license their use.

We believe this because we receive two or three requests each week from educators relating to non-NBC produced and owned programs.

We do make every effort to see to it that educators are put in touch with someone who can act upon their request.

As I said, NBC owns the copyright and the news documentary and public affairs programing, which we produce.

We at NBC want this material to be available to educators.

And further, we believe that our current policies do make it available today.

Let me take a few minutes to explain two major vehicles we have for the distribution of our copyrighted material.

First, NBC itself grants off-the-air taping licenses for the following NBC news programs: "NBC Nightly News," "Meet the Press," "NBC News Election Coverage," and NBC's coverage of Presidential press conferences.

This educational licensing programing was initiated by NBC's information and archives department in February of 1976 in response to numerous inquiries from schools, school districts, and libraries, for permission to take NBC programs off the air.

This policy permits educators to tape and retain for 1 year NBC news programs in consideration of a payment of a very modest license fee designed to cover only our administrative costs.

We have been somewhat disappointed in the response we have received to this program. The demand for these programs by educational institutions has been so small that in the 3 years this program has been in operation, we have averaged only nine licenses.

It is an interesting concept.

NBC documentaries are also available to educational institutions.

Now, I might add here, parenthetically, unlike ABC and CBS, we do not handle the licensing directly. In 1974, NBC entered into an arrangement with Films, Inc., giving them the exclusive educational distribution rights to NBC documentaries.

At that time, NBC turned over our existing inventory of approximately 350 titles which were previously available for licensing to educational institutions directly through NBC's educational enterprises division.

Since then, Films, Inc. has acquired for educational distribution approximately 10 hours of NBC documentaries each year.

The remaining available material was not acquired because either it could not be cleared for distribution, it duplicated material which Films, Inc. already had, or it was not appropriate for educational use.

So all of the NBC documentaries of interest to educational institutions which could be made available were and are being made available through Films, Inc.

As a result of these two programs I have outlined, the NBC licensing program and the Films, Inc. arrangement, the bulk of NBC-owned programing is currently available.

In addition, our own news archives division can and does from time to time make shorter pieces such as a segment from the nightly news or a piece of stock footage available to educational institutions when they request.

We at NBC are currently attempting to clear programs in advance of air date for off-air taping. We recently announced a project of which we are quite proud, relating to our widely acclaimed program on children's marijuana use, "Reading, Writing, and Reefer." This program attracted widespread interest when it was first shown last December, and many schools requested cassettes from us.

We are planning to rebroadcast this program as an NBC special treat on the afternoon of April 17. Through an arrangement with Films, Inc., we have offered educational institutions the opportunity free of charge to tape this program off the air.

Promotional material has been sent out to the schools through the educational magazines. The schools will simply need to complete a short, simple form and mail it to Films, Inc.

No other requirements, no charge.

We are interested in seeing how many schools will respond. We may learn something interesting from this experimental concept that we have embarked upon.

This project required not only the cooperation of Films, Inc., but also required NBC to clear the program.

This raises one of the several problems I would like to mention today which we face at NBC when making programs available.

First, clearances. In order to clear a program, we must fulfill our obligations to writers, actors, and others who helped to create the program. We have obligations under AFTRA agreements, the Writers Guild agreements, and other union agreements which must be considered.

In addition, often, our contract with a producer or other talent used in a program may entitle them to additional remuneration if the program is, in fact, licensed.

Finally, we must independently clear rights to graphic works or to music which included in the program.

The cost in meeting these obligations often is not small. And I should add that the costs are not just in dollars, but in personnel and time.

In addition to these obligations to unions and talents, we have another problem which must be faced in making a decision to make a program available.

From time to time, though I hope not too often, our programs are subject to litigation or to FCC investigation.

We must always be certain that a program which, for example, contains allegedly defamatory material or is a subject of a fairness complaint, is not made available.

We cannot risk the allegations of a supposedly damaged party of a willful additional defamatory act or contempt for the FCC which might result if we were to allow one of these programs to be reshown after we had received notice of a problem.

Often, we don't get a complaint immediately after the program is shown. This is one of the reasons why we make our programs available through the licensing arrangements I have already outlined. We must have a mechanism for retaining a sufficient amount of control over our program so as to make it possible for us to stop the distribution of a program when it has become the subject of a lawsuit, regulatory activities, or some other legal problems.

We also must be assured that some real control is exercised over the use of our programing.

This raises the third problem that we face. We must maintain the integrity of our programing. Many of our documentaries, for example, contain controversial issues. We have to be sure that NBC does not inadvertently, through subsequent editing of the programs, distort this meaning and defeat their objectivity or by the contest in which the programs are used, become associated with special interest groups on one side or another of these controversial issues.

This is another reason why we make our programs available through the orderly arrangements I have outlined.

In closing, I would like to say that we at NBC want our programs to be available to educational institutions who want to use them. We believe that is now the case under the systems I have already outlined.

I have tried also to describe for you some of the problems we face in making the programs available. We are more than happy to explore these questions with you.

And again, I would like to thank the subcommittee, Copyright Office, for making it possible for us to be here today with you.

Mr. LEHMAN. Thank you. [Applause.]

Next, we are going to move on to the presentations by public broadcasting. But I would like to say that to the extent that we move through those before the scheduled 1:15, I think we will proceed right on into the beginning of the educational presentations so that we can have our lunch at 1:15.

So people who are going to be making those early educational presentations might want to keep that in mind if there is time before lunch.

So first, I will call on Eric Smith who is counsel of the Public Broadcasting Service, to give the point of view of that organization. And then we will have individual presentations following that.

TESTIMONY OF ERIC H. SMITH, PUBLIC BROADCASTING SERVICE

Mr. SMITH. PBS is a private, nonprofit company, governed by 156 public television licensees operating 291 transmitting stations throughout the United States and its territories.

PBS does not produce programs, but functions on behalf of its members to distribute programs of high quality and national significance to all those stations for use at their option.

PBS also represents the concerns and interests of those stations at the national level.

We appreciate the opportunity to appear here today on the critical issue of the use of off-air recorded television programs for educational purposes.

Public television grew from educational roots. Beginning in 1952, local educational television stations were created to serve primarily the instructional and educational needs of each local community.

While the scope of the services performed by public television has expanded over the last 25 years to serve also the broad cultural and informational needs of our society, virtually all public television stations continue to provide district services to the educational community.

Indeed, over half of all the local stations are licensed to, and governed by, educational institutions—colleges and universities, State boards of education, and local school boards.

Instructional programs designed in cooperation with local and regional educational agencies represent almost 30 percent of the total broadcast hours of all stations combined.

Eight out of 10 stations provide school services, and 9 out of 10 offer postsecondary services, including courses for college credit, professional and inservice training, and formal adult education.

All of these stations produce and/or broadcast programs which have substantial educational content; there are programs of historical significance—"The Adams Chronicles," "The Age of Uncertainty," "The Ascent of Man," and programs on literature—"The American Short Story," "Anyone for Tennyson," "The Scarlet Letter."

Public television produces and broadcasts the finest in performance and drama programs, useful to the student of music, theatre, and dance, and public affairs programs useful to the student of political science and current events.

A great many of the programs on public television, and television generally, are being used by educators to instruct their students.

Public television's mandate to serve both the formal and informal educational needs of the American public has been confirmed year after year by Congress and by the State and local governments which provide a major portion of the system's financial support. The system has continued to encourage the greater use of the television medium in educational contexts, and its use is growing.

In a recent study by the Corporation for Public Broadcasting, in conjunction with the National Center for Education Statistics of the use of television in elementary and secondary schools during 1976–77, it was estimated that of the 2,275,000 teachers teaching some 46 million students within the ambit of the study, 950,000 used television.

It was found that of the 20 million students who used television at all, 15 million of them received a regular portion of their instruction by television during that year.

It appears that these startling numbers will grow further.

This same study further provided some insight into the use of television programs in schools through off-air recording. Of the 90,000 school buildings encompassed within the study, 63,500 had television programing available through all sources including off-air recording.

Of these, an estimated 25,000 buildings contain at least one videotape recorder; and in 80 percent of these buildings, off-the-air taping was done.

This would represent over 500,000 teachers, teaching almost 11 million students with television programs taped off the air.

There is no doubt that the technology of off-air recording—in simplest terms, recording broadcast programs for later use in the classroom—is an efficient mechanism for delivery of programs to the educational user and, as such, may be of advantage to both the producer of materials as well as the user.

Since the public television system functions as a program producer, and thus, as copyright owner of valuable materials, and also identifies with the needs and interests of the educational user, the role that public television will play in the complex process of balancing the needs of creator and user is clearly unique.

Institutionally, the system is both creator and user. We believe this dual role defines our perspective on this problem—the kind of balanced perspective which will be necessary in resolving the off-air recording issue.

We believe we have already made some significant advances within the public television community. In 1975, in recognition of the needs of education, PBS and its audiovisual arm, the Public Television Library, joined with the principal noncommercial distributors, the Agency for Instructional Television and the Great Plains National Instructional Television Library, in adopting a policy authorizing schools to record most of their programs off the air for use within a 7-day period.

We established, through the Public Television Library, a clearinghouse for information on licensing material beyond this period, and for many programs PTL licenses those rights.

While virtually all programs produced within public television are available for 7-day off-air use, programs acquired from independent sources were often not available because of the unwillingness of those sources to grant us this authorization right.

It should be noted that we were specifically authorizing such off-air use for most of our programs even though the "fair use" doctrine might already be applicable.

In the context of section 118 of the new law, this 7-day principle was enacted to enable us to authorize off-air use with respect to nondramatic music and visual arts material included in our programs.

The growth in the use of videotape recording technology, combined perhaps with the development of satellite distribution—already in place in public television and in prospect in commercial television as well—offers unique opportunities for services to be provided to education.

Rapid technological growth, much of which public television has been directly involved in—captioning for the hearing impaired and multichannel television sound, for example—presage major changes in the flow of information in our society.

The ability to adapt this technology to the needs of education, both formal and informal, has generated and will continue to generate new demands on our information systems, including our copyright system.

The question, therefore, of access by education to the use of television programs should not be regarded as simply a narrow copyright question.

Because the issues are broader than copyright itself, we would urge that some of the rigidities that have developed in the copyright system be given a fresh look to see if the old doctrines cannot be adapted to take care of new problems.

The area of off-air recording requires just such a fresh approach—particularly to the question of "fair use."

By way of disclaimer, I must add that the public television system has not adopted a definitive position on the precise application of "fair use" in this area. The PBS Board will, however, specifically address this question in the near future.

However, we can suggest a broad conceptual framework from our unique vantage point which may assist in resolving this important question. We would identify the following as key concepts:

As a starting point, the fair use doctrine does, and should, apply to the educational use of television programs through off-air recording.

This committee, the subcommittee, has said as much, and it is in the legislative history.

Second, the fair use standard should be simple, easy to understand, and easy to administer by teachers and school administrators.

We would suggest that the sheer ease of off-air taping, and the great difficulties of enforcement against those who without a license go beyond whatever is the fair use limit, argue strongly for the simplest possible definition so that teachers will know exactly where they stand and so that there be no doubt in anyone's mind what would constitute an infringement.

Most of the less egregious cases of school misuse of off-air taping are justifiable in part because of the complexities of the fair use doctrine.

In this regard, it is important that some of the concepts normally associated with fair use, such as spontaneity, the question of whether the doctrine can apply to a whole work, et cetera, should not becloud the issue.

Fair use began as, and should continue to be, an equitable doctrine, adaptable, like our Constitution, to new times and new circumstances.

Third, and for these reasons, we think that the fair use standard should be denominated as a simple period of time for use of a program recorded off the air. Upon expiration of that period, there should be no doubt that a license is required and that failure to obtain one is a clear infringement.

Fourth, the period of time must be long enough to test the program or series with students, and long enough that a license can practically be obtained within that time. It should be long enough to permit use of timely materials where their timely nature would not permit obtaining a license in any event. But the period should be short enough so as not to hinder the ability of the producer to license the materials to schools for a fee.

In this regard, it must be recognized that the only return on their investment that many producers can hope to achieve is from school licensing.

Clearly, the fixing of such a period will be a difficult task and will require compromise by both proprietors and educators. The proprietors will have to sacrifice the ability to sell some licenses; but, in return, they should obtain a readily enforceable standard and the cooperation of the educational community in a policing effort.

For their part, educators will not be able to use many programs as they would desire without obtaining a license but will know finally what is and is not permitted.

We are hopeful that the ad hoc committee can fashion such a compromise.

Fifth, whatever fair use standard is created, in the final analysis, it will not resolve the problem of effective use of television programs in schools. While fair use must be an important element of an excess system, it is still only an element. The ad hoc committee must give equal attention to the feasibility of improved licensing mechanisms.

It is apparent that in an educational context, effective use means one or two semesters, and this inevitably presumes that extensive licensing must be undertaken. But by looking at this overall question as one of fair use plus access through licensing, the germ of a compromise may begin to emerge.

As long as teacher access is cumbersome, time-consuming, and expensive—due, in part, to the low volume of licensing—use beyond the fair use period without licensing will be encouraged.

But if a more efficient method were created, then the incentive to infringe would be reduced.

Moreover, it is quite likely that a balanced fair use plus access system will increase the volume of licensing to the proprietor's benefit. The programing is readily available without delay, and license fees can decrease since tape transfer, delivery, and distribution costs need no longer be borne by the proprietor.

The Airlie Conference generated some creative suggestions in this area, and it was apparent that better licensing mechanisms alone would benefit both proprietors and educators. PBS will participate actively in working to create improvements in this area.

We believe that these basic concepts can form the basis of a resolution of this difficult question. In the end, tough compromises will have to be made by proprietors and users. But, once made, we believe both sides will stand to gain. Most important, the public will gain.

It is just such a complex process of balancing the needs of creators and users which is the ultimate objective of a sound copyright system.

Thank you very much. [Applause.]

[The prepared statement of Mr. Smith follows:]

STATEMENT OF ERIC H. SMITH, DEPUTY GENERAL COUNSEL, PUBLIC BROADCASTING SERVICE

Mr. Chairman and members of the committee, I am Eric Smith, deputy general counsel of the Public Broadcasting Service. PBS is a private nonprofit corporation governed by the 156 public television licensees operating 281 transmitting stations throughout the United States and its territories. PBS does not produce programs but functions, on behalf of its members, to distribute programs of high quality and national significance to all public television stations for use at their option. PBS also represents the concerns and interests of its stations at the national level.

We appreciate the opportunity to appear before the committee on the critical issue of the use of off-air recorded television programs for educational purposes.

Public television grew from educational roots. Beginning in 1952, local educational television stations were created to serve primarily the instructional and educational needs of each local community. While the scope of the services performed by public television has expanded over the last 25 years to serve also the broad cultural and informational needs of our society, virtually all public television stations continue to provide distinct services to the educational community. Indeed, over half of all the local stations are licensed to, and governed by, educational institutions—colleges and universities, state boards of education and local school boards. Instructional programs designed in cooperation with local and regional educational agencies represent almost 30 percent of the total broadcast hours of all stations combined. Eight out of ten stations provide in-school services and nine out of ten offer post-secondary services including courses for college credit, professional inservice training, and informal adult education. All of these stations produce and/or broadcast programs which have substantial educational content; there are programs of historical significance—the Adams Chronicles, the Age of Uncertainty, the Ascent of Man—and programs on literature—the American Short Story, Anyone for Tennyson, the Scarlet Letter.

Public television produces and broadcasts the finest in performance and drama programs, useful to the student of music, theater, and dance, and public affairs programs useful to the student of political science and current events. A great many of the programs on public television, and television generally, are being used by educators to instruct their students.

Public television's mandate to serve both the formal and informal educational needs of the American public has been confirmed year after year by Congress and by the state and local governments which provide a major portion of the system's financial support. The system has continued to encourage the greater use of the television medium in educational contexts, and its use is growing.

In a recent study by the Corporation for Public Broadcasting, in conjunction with the National Center for Education Statistics of the use of television in elementary and secondary schools during 1976–77, it was estimated that of the 2,275,000 teachers teaching some 46 million students within the ambit of the study, 950,000 used television. It was found that of the 20 million students who used television at all, 15 million of them received a regular portion of their instruction by television during that year. It appears that these startling numbers will grow further.

This same study further provided some insight into the use of television programs in schools through off-air recording. Of the 90,000 school buildings encompassed within the study, 63,500 had television programming available through all sources including by off-air recording. Of these, an estimated 25,000 buildings contain at least one videotape recorder and in 80 percent of these buildings, off-the-air taping was done. This would represent over 500,000 teachers, teaching almost 11 million students with television programs taped off-the-air.

There is no doubt that the technology of off-air recording—in simplest terms, recording broadcast programs for later use in the classroom—is an efficient mechanism for delivery of programs to the educational user and, as such, may be of advantage to both the producer of materials as well as the user.

Since the public television system functions as a program producer, and thus as copyright owner of valuable materials, and also identifies with the needs and interests of the educational user, the role that public television will play in the complex process of balancing the needs of creator and user is clearly unique. Institutionally, the system is both creator and user. We believe this dual role defines our perspective on this problem—the kind of balanced perspective which will be necessary in resolving the off-air recording issue.

We believe we have already made some significant advances within the public television community. In 1975, in recognition of the needs of education, PBS and its audio-visual arm, the Public Television Library, joined with the principal non-commercial distributors, the agency for Instructional Television and the Great Plains National Instructional Television Library, in adopting a policy authorizing schools to record most of their programs off-the-air for use within a seven-day period.

We established, through the Public Television Library, a clearinghouse for information on licensing material beyond this period and for many programs PTL licenses those rights. While virtually all programs produced within public television are available for seven day off-air use, programs acquired from independent sources were often not available because of the unwillingness of those sources to grant us this authorization right.

It should be noted that we were specifically authorizing such off-air use for most of our programs even though the "fair use" doctrine might already be applicable.

In the context of Section 118 of the new law, this seven-day principle was enacted to enable us to authorize off-air use with respect to nondramatic music and visual arts material included in our programs.

The growth in the use of videotape recording technology, combined perhaps with the development of satellite distribution—already in place in public television and in prospect in commercial television as well—offers unique opportunities for services to be provided to education.

Rapid technological growth, much of which public television has been directly involved in—captioning for the hearing impaired and multichannel television sound, for example—presage major changes in the flow of information in our society.

The ability to adapt this technology to the needs of education, both formal and informal, has generated and will continue to generate new demands on our information systems, including our copyright system.

The question, therefore, of access by education to the use of television programs should not be regarded as simply a narrow copyright question. Because the issues are broader than copyright itself, we would urge that some of the rigidities that have developed in the copyright system be given a fresh look to see if the old doctrines cannot be adapted to take care of new problems. The area of off-air recording requires just such a fresh approach—particularly to the question of "fair use."

By way of disclaimer, I must add that the public television system has not adopted a definitive position on the precise application of "fair use" in this area. The PBS Board will, however, specifically address this question in the near future.

However, we can suggest a broad conceptual framework from our unique vantage point which may assist in resolving this important question. We would identify the following as key concepts:

As a starting point, the fair use doctine does, and should, apply to the educational use of television programs through off-air recording. This Committee, the Subcommittee, has said as much, and it is in the legisltive history.

Second, the fair use standard should be simple, easy to understand, and easy to administer by teachers and school administrators. We would suggest that the sheer ease of off-air taping, and the great difficulties of enforcement against those who without a license go beyond whatever is the fair use limit, argue strongly for the simplest possible definition so that teachers will know exactly where they stand and so that there be no doubt in anyone's mind what would constitute an infringement.

Most of the less gregious cases of school misuse of off-air taping are justifiable in part because of the complexities of the fair use doctrine.

In this regard, it is important that some of the concepts normally associated with fair use, such as spontaneity, the question of whether the doctrine can apply to a whole work, etc., should not becloud the issue. Fair use began as, and should continue to be an equitable doctrine, adaptable, like our Constitution, to new times and new circumstances.

Third, and for these reasons, we think that the fair use standard should be denominated as a imple period of time for use of a program recorded off-the-air. Upon expiration of that period, there should be no doubt that a license is required and that failure to obtain one is a clear infringement.

Fourth, the period of time must be long enough to test the program or series with students, and long enough that a license can practically be obtained within that time. It should be long enough to permit use of timely materials where their timely nature would not permit obtaining a license in any event. But the period should be short enough so as not to hinder the ability of the producer to license the materials to schools for a fee.

In this regard, it must be recognized that the only return on their investment that many producers can hope to achieve is from school licensing.

Clearly, the fixing of such a period will be a difficult task and will require compromise by both proprietors and educators. The proprietors will have to sacrifice the ability to sell some licenses; but, in return, they should obtain a readily enforceable standard and the cooperation of the educational community in a policing effort.

For their part, educators will not be able to use many programs as they would desire without obtaining a license but will know finally what is and is not permitted. We are hopeful that the Ad Hoc Committee can fashion such a compromise.

Fifth, whatever fair use standard is created, in the final analysis it will not resolve the problem of effective use of television programs in schools. While fair use must be an important element of an access system, it is still only an element. The Ad Hoc Committee must give equal attention to the feasibility of improved licensing mechanisms.

It is apparent that in an educational context effective use means one or two semesters, and this inevitably presumes that extensive licensing must be undertaken. But by looking at this overall question as one of fair use plus access through licensing, the germ of a compromise may begin to emerge. As long as teacher access is cumbersome, time-consuming, and expensive (due in part to the low volume of licensing), use beyond the fair use period without licensing will be encouraged. But if a more efficient method were created, then the incentive to infringe would be reduced.

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The Airlie Conference generated some creative suggestions in this area, and it was apparent that better licensing mechanisms alone would benefit both proprietors and educators. PBS will participate actively in working to create improvements in this area.

We believe that these basic concepts can form the basis of a resolution of this difficult question. In the end, tough compromises will have to be made by proprietors and users. But, once made, we believe both sides will stand to gain. Most important, the public will gain.

It is just such a complex process of balancing the needs of creators and users which is the ultimate objective of a sound copyright system. Thank you very much.

Mr. LEHMAN. Thank you, Eric.

Now we will hear from a representative of the three television stations within the public broadcasting system which are responsible for most of the actual production of programing. And they have selected Robert Gold, who is with WNET, New York, to present their case.

TESTIMONY OF ROBERT GOLD, WNET-TV, NEW YORK

Mr. GOLD. I am sure the educators in the audience would like to get a shot or two in before lunch. So I will go right to my prepared remarks.

I am general counsel at WNET.

I am also speaking today on behalf of Boston's WGBH; and KCET, which is located in Los Angeles. Both of these prominent public television stations have endorsed our remarks.

WNET is a noncommercial, community-owned public television station licensed to Newark, N.J., and serving its 300,000 contributing members and millions of other viewers in the tristate New York City area.

We appreciate the recognition by this committee and the Copyright Office that stations like WNET, WGBH, and KCET, which produce and supply programs broadcast by the more than 270 PBS stations, might provide a special perspective to these proceedings.

The public broadcasting system's strength is in part derived from the diversity of its programing sources and the autonomy of local station managements. Although no one station can adequately represent the interests of all PBS members, we do hope that our brief remarks will reflect the positions of many of the other major producing stations who could not be in attendance.

We do not, however, speak solely from the vantage point of a producer of nationally distributed programs, although we are a principal provider of prime-time PBS programs, such as the widely acclaimed "Great Performances" series, "The Adams Chronicles," "Bill Moyer's Journal," and the heralded in-depth news program, "The MacNeil/Lehrer Report," which is coproduced with WETA and originates nightly from studios in both New York and Washington.

We also speak today as a community-based educational station with over 17 years of experience in providing instructional programs to local schools through our School Television Service. This past year close to 40 percent of WNET's total broadcast week was devoted to children's programing, including 35 hours each week of in-school classroom courses which reached approximately 650,000 students in 1,700 schools.

Our school service broadcast programs produced or distributed by many organizations represented at this meeting. WNET's staff conducted numerous seminars and workshops, attended by some of the 9,000 teachers who participate in this service; and we also published manuls to assist teachers in course selection and scheduling.

In addition, WNET's Office of Higher and Continuing Education is producing and broadcasting courses for college credit by adult nontraditional students who share their learning experiences in regular sessions held at local centers staffed by college instructors.

WNET, therefore, has a dual mandate: To produce innovative and stimulating cultural, public affairs, and entertainment programs for its general audience; and to maintain and expand its direct classroom service to our viewers and colleagues in the educational community.

In striving to fulfill this dual mandate, we have examined the thorny issues which are involved in the school off-air taping controversy and have wrestled with the following basic policy question: As a national producer, with program funding always in short supply and production expenses ever rising, should we seek to maximize our ancillary income by withholding off-air taping rights, or do we have a superior obligation to enable students to view our programs for a limited time in classroom settings withour financial benefit to us and even at the risk of reducing our eventual income?

WNET has determined that despite the financial consequences, we should permit the school community to enjoy certain rights in our programs. As the recent Carnegie Commission stated: "We believe it is time to launch new efforts to tap the power of broadcasting—for learning. The issue is not whether public broadcasting has a responsibility in education, but how best to carry out that responsibility."

WNET looks to the establishment of fair industrywide school off-air taping guidelines as a small first step in meeting this responsibility.

Accordingly, we have concluded that these issues can most effectively be resolved through the proposed ad hoc committee which is to be convened subsequent to this meeting.

Our initial suggestion to this committee would be to expand the traditional definition of fair use and to use a fresh approach in seeking a consensus. The doctrine of fair use has been called both obscure and the most troublesome in the whole law of copyright; and no court, to our knowledge, has previously ruled that reproduction of an entire audiovisual work—even by a school—should be condoned.

Section 107 of the new Copyright Act merely codified the previous leading judicial decisions. Therefore, since the new committee will be establishing guidelines which may authorize limited copying of entire works by schools without permission of the copyright owner, we believe that a limited departure from the conventional fair use concept is essential.

Secondly, we would embrace the right of teachers at nonprofit educational institutions to spontaneously tape entire programs off air for classroom use during a 7-day period without a fee and without the copyright owner's permission, We recognize, as did those who participated in the 1977 Airlie Conference, that the 7-day period neither completely satisfies the schools—who claim they need more time to fit currently broadcast programs into future curriculum schedules—nor satisfies the producers and distributors who argue that their income is thereby reduced.

We would respond by simply reminding the interested parties that some dissatisfaction is often the byproduct of negotiation and compromise.

As a footnote, we would ask the committee to consider whether occasional programs should be exempt from these school replay rights whenever production financing cannot be completed without agreement by the producer to withhold these rights from the schools.

Thirdly, we would endorse the formation of a clearinghouse where schools could receive the names and phone numbers of copyright owners or distributors and, whenever the copyright owner or distributor so elected, also be provided with the terms and conditions of a licensing agreement which would become effective on the eighth day after broadcast.

We would look to the educators on this new committee to devise reasonable policies for insuring that tapes would either be erased after the seventh day or be retained by the schools under a license agreement.

Finally, we oppose the adoption of any compulsory license arrangements for two basic reasons.

First, WNET has enjoyed an exemplary working relationship with over a dozen creative and technical unions and guilds. Some of these guilds in fact have already expressly permitted 7-day school replays of programs created by their members, without requiring additional payments. We have applauded this collaborative effort.

However, guild members, as well as owners and creators of underlying literary and artistic properties, justly are required to be paid additional compensation once programs leave the school 7-day replay sphere and enter the conventional audiovisual market.

The cumulative additional payments for a major production are substantial and far exceed the producer's licensing fees received, for example, if only one school happened to exercise its compulsory license. Therefore, the copyright owner must be in the position to decide whether it is economically feasible to distribute a program to audiovisual consumers on the eighth day after broadcast.

In addition, the existence of a compulsory license might ultimately—and even inadvertently—result in a loss of valuable programing for our general viewers. We foresee this inevitably occurring since certain performers, producers, and distributors, who are currently involved in public television, happen to derive their primary revenues from the educational community.

It is likely that these individuals and organizations would find a compulsory license to be a serious economic threat and would elect not to appear on television in order to preserve the bulk of their incomes. We therefore believe other licensing alternatives should be explored to avoid jeopardizing these established programing sources.

In closing, we would suggest that the new committee immediately begin working toward the adoption of industrywide guidelines, bearing in mind the following statement from the Carnegie Commission report:

> The potential of television and radio for learning is only beginning to be explored. Technology is advancing so rapidly that it is difficult to predict in what ways it will shape these media. Even now, however, it is clear that with careful planning, skillful execution and thorough evaluation, telecommunications will play an increasingly fundamental role in the learning process of Americans of all ages and backgrounds.

Thank you. [Applause.]

[The prepared statement of Mr. Gold follows:]

STATEMENT BY ROBERT GOLD, WNET-TV, NEW YORK

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Thank you.

Mr. LEHMAN. In keeping with the spirit of cooperation that our subcommittee has had over all the years since, as Congressman Kastenmeier mentioned, 1962, the Copyright Office, which, unlike most substantive agencies of Government, is actually in the legislative branch; therefore, perhaps more available to us and, more appropriately, available to us than some of the executive branch agencies.

I would like to let Ivan Bender from the Copyright Office, who has done a lot of work on this program, share some of the burden of introducing the speakers.

So now that we are ready to move on to the educational representatives for about the next half hour, I will let Ivan introduce them.

We will go on and see how far we can get until 1:15, when the cafeteria downstairs is open. Then, we will break for lunch and come back and finish up for the rest of the afternoon.

Ivan, if you want to continue.

Mr. **Bender**. Thank you, Bruce.

We are going to switch slightly the order of the educational presentations in order to convenience some of the presenters. So this switch is being done at their request. Therefore, the first presenter, and one whom I would like to introduce at this point, is August Steinhilber, who is associate executive director and legal counsel of the National School Boards Association, NSBA.

NSBA represents some 16,000 school districts and has a variety of members which make up its organization in terms, not only in the fact that some are elected and some others are of independent origin, but also that the typical school board member is, for the most part, a noneducator and is made up, in many instances, of attorneys and other professional types.

Gus is also at the present time chairman of the Ad Hoc Committee on Copyright Law, which in a coalition of nonprofit organizations representing elementary and secondary education, as well as higher education, public and school libraries, and other scholars.

That's a whale of a job, Gus. And I know that you are up to it, and you will keep us from thinking about our hunger pangs.

TESTIMONY OF AUGUST W. (GUS) STEINHILBER, AD HOC COMMITTEE ON COPYRIGHT LAW, ACCOMPANIED BY CHARLES ADAMS AND ERLING JORGENSEN

Mr. **Steinhilber**. Thank you very much.

With me this morning—no; it is no longer morning—we brought with us some individuals who are very important, especially when it gets to the question-and-answer period: Charles Adams, supervisor of media services of Phoenix Union High School in Phoenix. We brought Mr. Adams with us because he was one of the individuals who we found had a very interesting experience. And that is the Federal Bureau of Investigation decided that the media services for the Phoenix school district were subject to perhaps criminal prosecution. And before the case was dropped, he went through quite a bit of living hell, as the saying goes.

We also brought Bernard Freytag, who is with the National Education Association, a classroom teacher in Bucks County, Pa., and Erling Jorgensen, who is with Michigan State University.

I wish to thank all of you, especially the chairman and the distinguished ranking minority member of the subcommittee, for allowing us to present this statement.

As I said, the testimony which is about to be given, is on behalf of the Ad Hoc Committee on Copyright Law. This is a coalition of school, college, and literary groups that is very unique. It includes labor and management, elementary and secondary education, higher education, public education, private education, classroom teachers, media specialists, college professors, et cetera.

Indeed, if we were discussing collective bargaining, which we did literally down the hall in 2175 before the House Committee on Education and Labor, or if we were on another floor of this building discussing tuition tax credits before the Ways and Means Committee, or before the Labor-HEW Appropriations Committee, also down the hall, you would not at all in any way see any degree of common agreement on what the testimony would be.

It is, indeed, a very unusual and unique organization to have groups of this varied methods in philosophy to present a unified statement. But I would say as varied as we are, the statement may reflect the views of all, but perhaps maybe not reflect the views of any.

This is somewhat of a consensus between what I call the hawks and the doves, the hardliners and the negotiators.

But I would also add that the ad hoc committee in not coming before this group with a posture which seeks under the banner of fair use to tape everything off the air, use it without limitations, and retain the same indefinitely into the future.

Our not-for-profit status does not give us carte blanche authority to use any broadcast in any way that we personally deem necessary.

Before we go into the question of what we would like, what our needs are, I think you ought to be aware of the legal philosophy that we proceed to this group with. And it may agree or disagree with your personal philosophy, and it may or may not disagree with that of the committee.

But nevertheless, it is important for you to understand from whence we come.

First of all, I am not going to quote the Constitution back. That was already done very ably this morning. But I would say with that Constitution and with that authorization, the Congress did enact the the Copyright Act of 1976. But what is important to remember in our position is that the principal purpose of the Constitution is to encourage the dissemination and use of writings and discoveries.

If the law were so interpreted as to present dissemination, the very constitutionality of that interpretation would become suspect.

It is equally important to note that the U.S. Constitution does not develop copyrights as a proprietary right and property right in the traditional sense of property rights.

The Constitution looks not only just to the benefit of authors, but to the benefit of the publisher—ergo, the threshold question must always be asked on interpretations of the copyright, "Does the system best serve the needs of the public?"

Our constitutional philosphy and the constitutional requirements on copyright are buttressed by other philosophical points in American jurisprudence.

First, I know you will not like it, but I will still say it again, as I said at Airlie House. Copyrights are akin to monopolies, and all monopolies are viewed with a degree of distrust.

When a discussion centers upon the television industry, the question of monopoly is even greater because we are now discussing the combination of copyright with an industry obtaining licenses for the exclusive use of the airways, albeit by certain stations.

Finally, copyright restrictions are similar, for those of you legal scholars, to servitudes on property going back to, I guess, the statute of qua emtorius and a few other things, but remember servitudes were always frowned upon in our jurisprudence.

Now, let's go from that to education:

> Television is the most important influential teacher in our schools that is going to be joined. There is an endless opportunity. Television can do what no classroom teacher can do.

Interesting quote.

The reason it is an interesting quote was because it was given by the U.S. Commissioner of Education Ernest Boyer, speaking February 28, this week, at the banquet of the Institute of International Education here in Washington, D.C.

The off-the-air recording provisions of the copyright law should enable teachers to make reasonable use of television and radio programs in their day-to-day teaching with a minimum of delays and without additional payments. We would term this fair use. What are good teaching practices in the use of television and radio programs which should be considered reasonable uses of the medium?

The good teacher follows certain practices in the use of television and radio programs which are considered to be both reasonable and fair, as well as creative.

I would like to outline those processes.

One: The good teacher takes advantage of television and radio productions that have instructional value in his/her classroom. Typical of such programs are the BBC Shakespeare series, the Adams Chronicles, Nova, Sixty Minutes, Edward VII, the Advocates, symphony orchestras, ballets, operas, Sunday afternoon musicales at the White House, television specials such as the visit of the Vice Premier of the Peoples' Republic of China, as well as many news broadcasts.

There are times when the entire program would need to be shown to the class. There are other times, such as an opera, when only an excerpt is needed. Programs of this nature appear on both commercial and noncommercial broadcasting.

Two: The good teacher previews a given television and radio program at home at the time it is aired due to other professional and personal commitments. In such cases, the teacher needs to have the program taped off the air so it can be screened in advance of classroom use.

No successful classroom teacher would think of using any instructional material or media, be it a television or radio program, a film, or filmstrip or recording, without first seeing it and judging its appropriateness for the learning objective desired. The preview enables the teacher to determine whether to use the entire program, an excerpt from it, and if so, what part, or not to use the program at all.

Three: The good teacher prepares himself/herself and prepares the class in advance for the program. This requires the program to be taped so the teacher can replay it to make lesson plans, develop a strategy for its use in the classroom and construct evaluation procedures to determine whether students have learned from the experience.

The teacher has the responsibility to show the class how the television relates to what they are studying.

Four: The good teacher presents the program under the best psychological and environmental circumstances possible. Among other things, this means that the teacher must use the program at the time it is most needed and not at the time scheduled by the television station.

It also means that the teacher will need to use the program for each of his/her classes in the same subject, usually on the same day. Most educational systems using television for instructional purposes must rely on the recording of the programs broadcast from a central location, with replay at times that match individual school bell schedules.

Five: The good teacher reshows the program in whole or in part when necessary to recheck on areas of disagreement or to clarify issues which were not clear to the students in their initial viewing. Reshowing the program is also needed for students who were absent when the program was first shown. There are also many times when the entire class does not need to see the program, but when a small group in the class does need to see it. The topic of the program is relevant to a project being undertaken by the small group, but not necessarily relevant to the entire class.

In colleges and universities, faculty members are involved about equally in research and teaching. For classroom purposes, they frequently have to supplement textbooks, collections of materials, and library reserve shelves with excerpts from newspapers, journals, and books.

I would like to go into printed material for just a moment before making the transition.

The need for the excerpts to be used in classrooms often arises under circumstances that preclude the seeking or obtaining advance consent from the copyright owner.

Similarly, they need to take copies of works or parts of works to their offices for use in their course preparation, research, and publications. As the volume of works and materials that forms the basis of scholarly research, publication, and teaching has proliferated, the need to have copies readily available at work desks and in classrooms has commensurately increased.

This kind of copying is as fair to the copyright proprietors as it is essential to the users. There is no profit motive or commercial advantage. The kind of copying that is fair use does not result in incorporation in compilations of teaching materials or publications to be distributed and sold in the future.

Consequently, the kind of copying defended here does not diminish sales or potential profit of the publishers and authors; there is no significant likelihood that the scholar or teacher would purchase the material or require a classroom of students to do so.

Indeed, when one looks at printed materials, there is reason to believe that the distribution to students of copies of excerpts from copyrighted works, and quotation and citation of them in scholarly publications, has a promotional effect that leads to later purchases of the entire work of subscriptions to periodicals that would not otherwise occur. It is more than fair to the copyright owner, as it enhances the economic value of the work.

Now, off-the-air recording these arguments are even more cogent than for printed material. Usually it will be impossible for a teacher to obtain a copy of a television broadcast from a producer for showing to students within a day or so of the airing, although that may be the only way to take advantage of the impact of the program.

Also, letting the program be shown in a classroom within the next couple of days, rather than forcing students to view it during evening or nighttime hours, does not reduce the profitability to the producer. The urgent needs of research and classroom use do not involve rebroadcasting programs. Nor do they involve the planning and building of a long-term collection of records; the fairness of that kind of copying is a separate question from the fairness of relatively spontaneous copying.

I would like to move now to what I call some of the frustrations of those of us who represent education.

The rhetoric which surrounds the discussion of fair use and off-the-air taping tends to anger many ad hoc members. We hear comments about piracy, that we are stealing someone's property, et cetera. The education community, when it uses the term fair use and off-the-air taping, is not engaged in profit making endeavors nor is it going to use the materials in question before an audience of the general public. It should be borne in mind that the industry also actively solicits education's endorsements of its products.

On the one hand, we hear complaints that the industry has exclusive rights to the program "Roots," and on the other hand we see each and every evening a note appear on the television screen that the program was "Recommended by the National Education Association."

It did not come by per chance, by pure guess or accident.

The education community finds itself in another dilemma on the issue before this committee. If we wish to use a work in its entirety, the industry says that the sheer amount used precludes the doctrine of fair use from applying. If, on the other hand, the program is excerpted—if that is even possible—then industry complains that the journalistic product is injured and perhaps its reputation.

Thus we must be prohibited from excerpting. In reality, off-the-air taping is not a new issue nor is it a completely different one from printed copying, nor is it different from anything else which has happened with respect to the audio programs.

Tape recording of audio programs has been with us for some time and excerpts from books are considered to be scholarly research.

The last one which I have added literally in the back of the room—I call this one treaties. And we are so naive. We really don't understand contracts. And we have no belief in what collective bargaining is about.

Collective bargaining is a way of life with us. Indeed, many State laws on collective bargaining are far more expensive than bargaining that you do under the National Labor Relations Act.

If you had to bargain on management prerogatives, if you had to bargain on such things as who your superviser is going to be, I would think you would not believe we are so naive. We are making our agreements with the NEA and the AFT in coming before you.

Sometimes we think perhaps you should be making your agreements with your guilds before coming before us.

Agreements relating to off-the-air taping do exist in the field of public broadcasting. For example:

Public Broadcasting Service—I will name a few of the items:

Students, teachers, staff of nonprofit, accredited institutions within the coverage area may make copies.

School rerecording is authorized for 7 days.

Users may record and reuse materials for balance of school year.

The records may not be given away, loaned, sold, et cetera. Agency for Instructional Television:

Students, teachers, staff may make copies.

Rerecording is authorized in classroom auditoriums or for laboratory use.

The copy may not be given away, loaned, sold, et cetera.

School rerecording is authorized for a 7-day period.

Agencies authorized to use the AIT series may permit their school systems to retain rerecordings for entire school year, September through June.

I have copies of these agreements which can be supplied for the record, if necessary.

In conclusion, we stand ready, willing, and able to cooperate in working out an agreement as to how much off-the-air taping qualifies for fair use as we did in developing the questions in the case of printed materials. Indeed, I wish to go on record as a member of that negotiating team in saying that we worked with honorable professionals when we negotiated with the American Association of Publishers and the Authors League in that endeavor.

Being ready, willing, and able to sit down and discuss the limits of off-the-air taping and fair use does not mean we are willing to abandon our resolve to protect the availability of copyrighted materials. The state of the law is complex and we have our options, whether it be through Congress or the courts, or whether it be through the copyright law, antitrust laws or the Federal Communications Act.

We are willing to enter into good faith negotiations, which in the tradition means meeting at reasonable times and reasonable places within an effort to reach an agreement.

I would also point out one last comment. Under no State law or Federal-National Labor Relations Act is it an unfair labor practice when the negotiations come to an impasse.

Thank you.

[Applause.]

[The prepared statement of Mr. Steinhilber follows:]

STATEMENT OF AUGUST W. STEINHILBER

INTRODUCTION

Mr. Chairman, I wish to thank you and the distinguished Ranking Minority Member of this sub-committee for allowing us to present our testimony before your sub-committee.

As I said, the testimony which is about to be given is on behalf of the Ad Hoc Committee on Copyright Law. This coalition of school, college and library groups is unique. It includes labor, management, elementary and secondary education, higher education, public education, private education, classroom teachers, media specialists, etc.

Indeed, if we were discussing collective bargaining or tuition tax credits or the Labor/HEW appropriations, you would not see the degree of agreement which this statement represents.

It must be pointed out, however, that the make-up of the Ad Hoc Committee is such that no statement can be said to reflect all of the views of all the members. This is a consensus between the hawks and doves—the hard liners and the negotiators.

The Ad Hoc Committee is not coming before this Committee with a posture which seeks under the banner of "fiair use" to tape everything off the air, use it without limitations, and retain same indefinitely. Our not-for-profit status does not give us carte blanche authority to use any broadcast in any way which we deem proper.

CONSTITUTIONAL CONCERNS

Before looking directly at the issue of off-the-air taping, video cassettes and the like, it behooves us to again look at the constitutional basis of the copyright law.

Article I Section 8—the Congress shall have the Power * * * To promote the Progress and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

With this constitutional authorization, the Congress did enact the Copyright Act of 1976. It is important to remember that the principal purpose of the Constitution is to encourage the dissemination and use of writings and discoveries. If the law were so interpreted as to prevent dissemination, the very constitutionality of that interpretation would become suspect.

It is equally important to note that the U.S. Constitution does not develop copyrights as a property right in the traditional sense of that term. The Constitution looks not for the benefit of individual authors but to the benefit of the public, ergo, the threshold question must be asked whenever copyright interpretations are developed "Does the system best serve the needs of the public?"

LEGAL PHILOSOPHY

The constitutional limits on copyright are buttressed by other philosophical points of view in American Jurisprudence. First, copyrights are akin to monopolies and all monopolies are viewed with a degree of distrust. When a discussion centers upon the television industry, the question of monopoly is even greater. We are now discussing combining copyright with the industry obtaining licenses for the exclusive use of the airways. Finally, copyright restrictions are similar to servitudes on property which historically were frowned upon.

The off-the-air recording provisions of the copyright law should enable teachers to make ***reasonable use*** of television and radio programs in their day-to-day teaching with a minimum of delays and without additional payments. We would term this "fair use." What are good teaching practices in the use of television and radio programs which should be considered "reasonable" uses of the medium?

The good teacher follows certain practices in the use of television and radio programs which are considered to be both reasonable and fair, as well as creative.

1. *The good teacher takes advantage of television and radio productions that have instructional value in his/her classroom.* Typical of such programs are the BBC Shakespeare series, the Adams Chronicles, Nova, Sixty Minutes, Edward VII, The Advocates, symphony orchestras, ballets, operas, Sunday afternoon musicales at the White House, television specials such as the visit of the Vice Premier of the Peoples' Republic of China, as well as many news broadcasts.

There are times when the entire program would need to be shown to the class. There are other times, such as in an opera, when only an excerpt is needed. Programs of this nature appear on both commercial and non-commercial broadcasting.

2. *The good teacher previews a given television and radio program before using it with his/her class.* Sometimes a teacher is unable to view the program at home at the time it is aired due to other professional and personal commitments. In such cases the teacher needs to have the program taped off the air so it can be screened in advance of classroom use.

No successful classroom teacher would think of using any instructional material or media—be it a television or radio program, a film or filmstrip or recording—without first seeing it and judging its appropriateness for the learning objective desired. The preview enables the teacher to determine whether to use the entire program, an excerpt from it (and if so, what part), or not to use the program at all!

3. *The good teacher prepares himself/herself and prepares the class in advance for the program.* This requires the program to be taped so the teacher can replay it to make lesson plans, develop a strategy for its use in the classroom and construct evaluation procedures to determine whether students have learned from the experience. The teacher has the responsibility to show the class how the television relates to what they are studying.

4. *The good teacher presents the program under the best psychological and environmental circumstances possible.* Among other things, this means that the teacher must use the program at the time it is most needed and not at the time scheduled by the television station.

It also means that the teacher will need to use the program for each of his/her classes in the same subject, usually on the same day. Most educational systems using television for instructional purposes must rely on the recording of the programs broadcast from a central location, with replay at times that match individual school bell schedules.

5. *The good teacher re-shows the program in whole or in part when neccesary to re-check on areas of disagreement or to clarify issues which were not clear to the students in their initial viewing.* Re-showing the program is also needed for students who were absent when the program was first shown. There are also many times when the entire class does not need to see the program but when a small group in the class does need to see it. The topic of the program is relevant to a project

being undertaken by the small group but not necessarily relevant to the entire class.

In colleges and universities, faculty members are involved about equally in research and teaching. For classroom purposes, they frequently have to supplement textbooks, collections of materials and library reserve shelves with excerpts from newspapers, journals and books. The need for the excerpts to be used in classrooms often arises under circumstances that preclude the seeking or obtaining advance consent from the copyright owner.

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Now for off-the-air recording these arguments are even more cogent than for printed material. Usually it will be impossible for a teacher to obtain a copy of a television broadcast from a producer for showing to students within a day or so of the airing, although that may be the only way to take advantage of the impact of the program.

Also, letting the program be shown in a classroom within the next couple of days, rather than forcing students to view it during evening or night-time hours, does not reduce the profitability to the producer. The urgent needs of research and classroom use do not involve rebroadcasting programs. Nor do they involve the planning and building of a long-term collection of records; the fairness of that kind of copying is a separate question from the fairness of relatively spontaneous copying.

The rhetoric which surrounds the discussion of fair use and off-the-air taping tends to anger many Ad Hoc members. We hear comments about piracy, that we are depriving people of a living, that we are stealing someone's property, etc. The Education community, when it uses the term fair use and off-the-air taping, is not engaged in profit making endeavors nor is it going to use the materials in question before an audience of the general public. It should be borne in mind that the industry also actively solicits education's endorsements of its products.

On one hand, we hear complaints that the industry has exclusive rights to the program "Roots" and on the other hand we see each and every evening a note appear on the television screen that the program was "Recommended by the National Education Association".

The education community finds itself in another dilemma on the issue before this Committee. If we wish to use a work in its entirety, the industry says that the sheer amount used precludes the doctrine of fair use from applying. If, on the other hand, the program is excerpted (if that is even possible), then the industry complains that the journalistic product is injured and perhaps its reputation.

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Agreements relating to off-the-air taping do exist in the field of public broadcasting. For example:

Public Broadcasting Service—I will name a few of the items:

Students, teachers, staff of non-profit, accredited educational institutions within the coverage area may make copies;

School rerecording is authorized for seven days.

Great Plains National:

Users may record and reuse materials for balance of school year;

The records may not be given away, loaned, sold, etc.
Agency for Instructional Television:
Students, teachers, staff may make copies;
Rerecording is authorized in classroom, auditoriums or for laboratory use;
The copy may not be given away, loaned, sold, etc.;
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Agencies authorized to use the AIT series may permit their school systems to retain rerecordings for entire school year September through June.

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In conclusion, we stand ready, willing and able to cooperate in working out an agreement as to how much off-the-air taping qualifies for fair use as we did in developing the questions in the case of printed materials. Indeed, I wish to go on record as a member of that negotiating team in saying that we worked with honorable professionals when we negotiated with the American Association of Publishers and the Authors League in that endeavor.

Being ready, willing and able to sit down and discuss the limits of off-the-air taping and fair use does not mean we are willing to abandon our resolve to protect the availability of copyrighted materials. The state of the law is complex and we have our options whether it be through Congress or the courts, or whether it be through the Copyright Law, anti-trust laws or the Federal Communications Act.

Mr. BENDER. It is 10 after, and we do have a few more minutes, but rather than launch into the second presentation, we have all been sitting a long time. We may take a few moments for people to get downstairs to the cafeteria.

In any event, we will break now and reconvene at 2:15.

[Whereupon, at 1:10, the hearing was recessed to reconvene at 2:15 this same day.]

AFTERNOON SESSION

Mr. BENDER. If everybody will please take their seats, we would like to begin the rest of the program.

To resume where we left off, the next presenter for the educational community is Dr. Howard Hitchens who is executive director of the Association for Educational Communications and Technology, AECT, whose annual meeting, incidentally, comes right on the heels of this session.

The individual membership of AECT comprises some 9,000 individuals who are primarily media specialists and educational professionals with responsibility for the use of communications and technology in schools, both elementary, secondary, and postsecondary.

TESTIMONY OF HOWARD HITCHENS, EXECUTIVE DIRECTOR, ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY

Mr. HITCHENS. Thank you very much.

I want to thank the chairman, Chairman Kastenmeier, the ranking minority member, Mr. Railsback, for the opportunity to participate.

And I would like at the outset to indicate general endorsement of what was said before lunch by the chairman of ad hoc committee of educational organizations.

As Gus Steinhilber indicated, we are not always unanimous in everything we do, but we do have a general consensus. The membership of the association I represent is approximately evenly divided between people who work in higher education and those working in the elementary and secondary schools.

Incidentally, we have about another 20 percent of our constiuency who work in various education and training sessions.

The unanswered questions concerning the application of fair use criteria in the new copyright law to audiovisual materials of all kinds, and in particular the copying of audiovisual information off the air waves, are usually most important to our constituency. Our people are the ones who are asked daily to make copies and are expected to provide guidance to classroom teachers and faculty members in educational institutions of all kinds across the country. Therefore, the need for guidelines for off-air copying is felt very strongly by my constituency, perhaps more strongly than any other small constituency in education.

We do endorse the notion, as has been said by the committee, there is some limited application of fair use to have air copying.

Therefore, my remarks are aimed at depicting as well as possible the state of existing practice in the schools and colleges across the country in this area. I will touch briefly upon arguments for applying fair use principles to off-air copying; I'll relate some current information to demonstrate the state of existing practice, and finally, I'll provide some suggestions for formulas that might be used in arriving at guidelines for the application of fair use doctrine to off-air copying of audio visual information.

Television is the most pervasive communication medium in the history of the United States. Today—I'll go quickly—there are approximately 720 commerical television stations and 269 public broadcast stations. Television signals are received in more than 73 million homes and 98 percent of our homes have at least one television set; nearly half the homes have two sets. More than three fourths of the homes are able to receive color television. There are between 700 and 1,000 closed-circuit educational television systems operating in institutions across this country besides.

They range in size from a simple camera, recorder, and monitor in a single school room to a county wide system such as we have in, for example, Broward County, Fla., or Washington County, Md. Currently there are 500 channels of instructional television fixed service in operation by 99 licensees. Most of these are serving education well.

One major finding in that survey described by Eric Smith earlier was that broadcast schedules are a major hinderance to teacher's use of television. This undoubtedly has led to the development of such alternative ways of providing TV programs as off-the-air recording for more convenient use or timely use, and providing the program in videotape format at the outset.

A recent study in West Virginia of instructional television use in elementary schools in that State further reinforces the difficulty with broadcast schedules and scheduling the activities of learners during the school day. Overall, the most frequent and dominant reason expressed in that survey as to why instructional television was not used in the school was that the broadcast times were inconvenient.

Incidentally, the language I use has not been reviewed by legal counsel. I am just a plain guy with no legal training.

The pervasive reason of this medium and the ready availability both of the hardware and software capability to record programs off-air and the tendency to do so in order to provide the necessary learning experiences for students are for the necessity to develop some workable, reasonable guidelines for the application of the fair-use principle to educational uses of off-air recorded materials.

There has been much talk of a survey to be conducted over a period of time to determine the state of practice with regard to off-air recording. At the present time there is considerable information available. I would like to review some random sampling for the benefit of this conference.

For example, I got on the phone a week ago and talked to Dr. Marvin Davis of the Hartland Educational Agency in Iowa. He had just done a telephone survey of the nine schools in his district. These were five high schools, two junior high schools, and two elementary schools. Of the nine, six record materials and erase them after 1 week, using them for direct application to the curriculum that they teach. Three of the schools keep the programs longer, as long as they feel they are curriculum related. On the average, the nine schools record off-air 3 to 5 hours per week.

Another example, the district coordinator of library services in Clintonville, Wis., in a letter states the following problems which need to be resolved. She wrote me this letter unsolicited when she heard this meeting was going to be held.

One: Students cannot view it at home in the evening because other family members either want another program or do not want to watch an educational program.

Two: Many students are regularly employed and not at home when program is aired.

Three: With the increased number of sports offered to girls, many of these are evening games—this one I like—the teacher cannot ask a team member to skip the game and stay home to watch a TV program. The student would be dropped from the team.

Four: Many of the homes in our district are not equipped to receive educational TV. I would estimate that 80 percent are not. You will have to interpret that; I can't.

Five: Good instruction calls for teacher previewing the program, introducing it to the class, viewing and discussing it. This is not possible at present. When I have written far in advance for permission to tape, I received no reply.

Six: At times excellent programs are aired perhaps during the first semester and the subject is taught the second semester. Today that exposure is lost.

Seven: Her seventh complaint: The purchase price of prepared video tapes makes them prohibitive to the average school. It is simple to cite the problems, but not necessarily the solutions. Humbly I suggest consideration of limited taping rights 1 week to 6 months. Further consideration might be given to a blanket fee, although I would think the sponsors would welcome the increased audience exposure to the students.

And that's the end of the comments that this lady had.

Turning to another example, a survey conducted by Ralph Whiting, the supervisor of instructional media and technology in the Bureau of Instructional Media Programs, Department of Public Instruction, Madison, Wis., discloses the following:

(a) Ninety-seven percent of the schools in Wisconsin have television receivers available.

(b) Ninety-six percent have a videotape recorder available either constantly or most times. Programs taped off air were done in the following percentages: 71 percent by media specialists or aides, 22 percent personnel at the district level, and 14 percent classroom teachers.

(c) Eighty-six percent of the respondents indicated that the recording was done by a VTR that was available for use with a monitor in the classroom.

(d) The kinds of programs that were recorded were the following: (1) 27 percent news; (2) 72 percent specials; (3) 3 percent sports programs; and (4) 24 percent were other which included movies, documentaries, et cetera.

(e) Eighty-nine percent of the respondents expect to acquire additional video tape recorders within the next 2 to 3 years. The amount of off air video taping in the next several years is expected to increase by 66 percent, and to at least remain the same by the rest of the respondents.

(f) When asked what is the shortest length of time that you could keep the tapes and still meet your educational needs: Replies were 2 weeks to 1 year. Incidentally, 47 percent of the respondents indicated that 1 year was the shortest length of time that would meet their educational needs.

(g) Eighty percent of the respondents were willing to pay a reasonable user fee.

(h) Another interesting finding was that in response to the question, "If programs aired on the networks were available soon after airing for rent or sale at a reasonable cost, would you still tape them?"; 66.6 percent said "yes."

Another short example, Mary Ellen Jones of Springfield, Ohio, conducted a survey of small liberal arts colleges throughout the country. Based on replies from 38 colleges in 22 States she reports that 21 percent of the colleges had the ability to circulate video tapes 5 years ago; 43 percent have that capability today; and 53 percent expect to have that capability 5 years from now. Closed-circuit television distribution has grown significantly in those small liberal arts colleges.

The national office of our association has been contacted repeatedly over the months since the new copyright law took effect on January 1, 1978. The usual complaint is that the media director in an institution, high school district, or college, is being asked for advice concerning a policy on off-air copying.

The usual experience has been that if the legal counsel of the institution has been asked for an opinion, he has often responded often with a very strict interpretation of the law to the effect that no off-air copying is permissible. This denies the classroom teachers the faculty the opportunity to use programs in those institutional contests where this definition has been provided by legal counsel.

Often these legal counsel are not specialists in copyright law.

But the existing practice and the force of the growing availability of the products of American communications technology generally work against a strict interpretation of the law as it presently is written. There is a need for some agreement between the proprietors and the consumers or users of information concerning the application of the fair use principles written into the 1978 law to leave in particularly audiovisual information that is broadcast through the air waves.

We need to define limited use.

I propose that the guidelines for the application of the fair use concept in the copyright law concentrate on the question: How long can a recorded off-air program be retained for instructional use by a nonprofit educational institution? There are several alternatives that have been proposed. This is really the most important message I have for you, and it is very short.

A. In the position adopted by the board of directors of my own association last April—I'm sure most of you are familiar with it—the following description, "That the videotape and all duplicate copies be erased or otherwise destroyed within 1 calendar year of the original recording date."

That entire position paper I have attached to this statement so it can be entered into this record.

B. In a newly developed position paper from a group of instructional media directors in the Washington/Oregon area of the northwest United States, the duration of use is described as follows: "Fair use for recording off-the-air programs extends 30 days from the time a program is broadcast and further extends until the program is available for purpose, lease, rental, or licensing." That position, by the way, I must thank Charles Vlcek for. And that position paper in its entirety is also appended to my statement.

I would like to give you one other proposition. And this is from the National Association of State Educational Media Professionals. It is a group which is comprised of the media coordinators in the State education bureaus of the 50 States, the duration of retention issue described by them in a resolution they adopted in December of last year.

"Copyright releases that will give schools permission to record and use them throughout the school year in which they are broadcast."

To conclude, off-air copying, using the hardware technology available to us in education, is a reality which must be respected by the copyright proprietor community as well as the educational community. It is the position of AECT that some accommodation should be reached whereby a reasonable set of guidelines for the copying, retention, and use of broadcasting audiovisual information so it can be more available for the instructional programs of our educational institutions.

This recommendation is made with the full knowledge there is an inherent danger to the continued health of the community of small commercial firms who produce educational materials which are broadcast over the commercial or public broadcasting stations.

It is our position that the needs of education, and the instructional programs at all levels of education and training override the proprietary interests of the broadcasting entities.

Thank you very much. [Applause.]

[The prepared statement of Mr. Hitchens follows:]

STATEMENT BY HOWARD HITCHENS, EXECUTIVE DIRECTOR, AECT

The organization which I represent, the Association for Educational Communications and Technology, is comprised of approximately 9,000 individual professional media people throughout education and training in the United States. Our membership is approximately evenly divided between those working in higher education and those working in the elementary and secondary schools. The unanswered questions concerning the application of the fair use criteria in the new copyright law to audiovisual materials of all kinds—and in particular the copying of audiovisual information off the air waves—are usually most important to our constituency. Our people are the ones who are asked daily to make copies and are expected to provide guidance to classroom teachers and faculty members in educational institutions of all kinds across the country. Therefore, the need for guidelines for off-air copying is felt very strongly by my constituency, perhaps more strongly than any other small constituency in education.

I endorse the statement from the report of the House Judiciary Committee: "The committee believes that the fair use doctrine has some limited application in this area * * *. Therefore my remarks are aimed at depicting as well as possible the state of existing practice in the schools and colleges across the country in this area. I will touch briefly upon arguments for applying fair use principles to off-air copying. I'll relate some current information to demonstrate the state of existing practice and, finally, I'll provide some suggestions for formulas that might be used in arriving at guidelines for the application of fair use doctrine to off-air copying of audiovisual information.

Television is the most pervasive communication medium in the history of the United States. Today there are approximately 720 commercial television stations and 269 public broadcast stations. Television signals are received in more than 73 million homes and 98 percent of our homes have at least one television set—nearly half the homes have two sets. More than three-fourths of the homes are able to receive color television. There are between 700 and 1,000 closed-circuit educational television systems operating in institutions across this country. They range in size from a simple camera, recorder and monitor in a single school room to a countywide system such as we have for example in Broward County, Florida, or Washington County, Maryland. Currently there are 500 channels of instructional television fixed service in operation by 99 licensees. Most of these are serving education well.

A recent major study of the use of instructional television in elementary and secondary schools in the United States disclosed that television programming is available to more than one and one-half million of the estimated three million elementary and secondary school teachers in the United States. Approximately thirty percent (726,000) of these teachers use instructional television programs regularly. Approximately thirty-five percent of the students in the elementary and secondary schools view ITV regularly. Approximately thirty percent of all educators, administrators as well as teachers, have had training in the use of instructional television.

The survey further disclosed that more than fifty percent of all the educators in the United States have positive attitudes toward instructional television.

One major finding in that survey described by Eric Smith earlier, was that broadcast schedules are a major hindrance to teacher's use of television. This, undoubtedly, has led to the development of such alternative ways of providing TV programs as off-the-air recording for more convenient use, or timely use and providing the program in video tape format at the outset. A recent study in West Virginia of instructional television use in elementary schools in that State further reinforces the difficulty with broadcast schedules and scheduling the activities of learners during the school day. Overall, the most frequent and dominant reason expressed in that survey as to why instructional television was not used in the school was that the broadcast times were inconvenient.

Television for instruction is an extremely well established communication medium in American education.

There are approximately one million video cassette record and play back units available throughout this country currently. Although most of those have been sold for consumer use in the privacy of their homes, a significant number—unfortunately I have been unable to pin that number down—are available in the schools and colleges. The pervasive reason of this medium and the ready availability both of the hardware and software capability to record programs off-air and the tendency to do so in order to provide the necessary learning experiences for students argue for the necessity to develop some workable, reasonable guidelines for the application of the fair use principle to educational uses of off-air recorded materials.

There has been much talk of a survey to be conducted over a period of time to determine the state of practice with regard to off air recording. At the present time there is considerable information available, I would like to review some random sampling for the benefit of this conference.

Dr. Marvin Davis of the Hartland Educational Agency in Iowa, did a telephone survey of the nine schools in his district. These were five high schools, two junior high schools, and two elementary schools. Of the nine, six record materials and erase them after one week, using them for direct application to the curriculum that they teach. Three of the schools keep the programs longer, as long as they feel they are curriculum related. On the average, the nine schools record off-air three to five hours per week.

Another educator, the district coordinator of Library Media Services in Clintonville, Wisconsin in a letter, states the following problems which need to be resolved:

1. Students cannot view it at home in the evening because other family members either want another program or do not want to watch an educational program.
2. Many students are regularly employed and not at home when program is aired.
3. With the increased number of sports offered to girls, many of these are evening games. The teacher cannot ask a team member to skip the game and stay home to watch a TV program. The student would be dropped from the team.
4. Many of the homes in our district are not equipped to receive educational TV—I would estimate that 80 percent are not.
5. Good instruction calls for teacher previewing the program, introducing it to the class, viewing and discussing it. This is not possible at present. When I have written far in advance for permission to tape, I received no reply.
6. At times excellent programs are aired perhaps during the first semester and the subject is taught the second semester. Today that exposure is lost.
7. The purchase price of prepared video tapes makes them prohibitive to the average school. It is simple to cite the problems, but not necessarily the solutions. Humbly I suggest consideration of limited taping rights one week to six months. Further consideration might be given to a blanket fee, although I would think the sponsors would welcome the increased audience exposure to the students.

A survey conducted by Ralph Whiting, the supervisor of Instructional Media and Technology in the Bureau of Instructional Media Programs, Department of Public Instruction, Madison, Wisconsin, discloses the following:

A. Ninety-seven percent of the schools in Wisconsin have television receivers available.

B. Ninety-six percent have a video tape recorder available either constantly or most times. Programs taped off air were done in the following percentages: Seventy-one percent by media specialists or aides, twenty-two percent personnel at the district level, and fourteen percent classroom teachers.

C. Eighty-six percent of the respondents indicated that the recording was done by a VTR that was available for use with a monitor in the classroom.

D. The kinds of programs that were recorded were the following:

1. Twenty-seven percent news,
2. Seventy-three percent specials,
3. Three percent sports programs, and
4. Twenty-four percent were other which included movies, documentaries, etc.

E. Eighty-nine percent of the respondents expect to acquire additional video tape recorders within the next two to three years. The amount of off air video taping in the next several years is expected to increase by sixty-six percent, and to at least remain the same by the rest of the respondents.

F. When asked what is the shortest length of time that you could keep the tapes and still meet your educational needs: replies were two weeks to one year. Incedentally, forty-seven percent of the respondents indicated that one year was the shortest length of time that would meet their educational needs.

G. Eighty percent of the respondents were willing to pay a reasonable user fee.

H. Another interesting finding was that in response to the question "if programs aired on the networks were available soon after airing for rent or sale at a reasonable cost, would you still tape them?" 66.6 percent of the respondents said yes.

Another short example, Maryellen Jones of Springfield, Ohio, conducted a survey of small liberal arts colleges throughout the country. Based on replies from thirty eight colleges in twenty-two States, she reports, that twenty-one percent of the colleges had the ability to circulate videotapes five years ago; forty-three percent have that capability today; and fifty-three precent expect to have that capability five years from now. Closed-circuit television distribution has grown significantly in those small liberal arts colleges.

The national office of our association has been contacted repeatedly over the months since the new copyright law took effect on January 1, 1978. The usual complaint is that the media director in an institution, high school district, or college, is being asked for advice concerning a policy on off-air copying.

The usual experience has been that, if the legal counsel of the institution has been asked for an opinion, he has often responded often with a very strict interpretation of the law to the effect that no off-air copying is permissible. This denies the classroom teachers and faculty the opportunity to use programs in those institutional context where this definition has been provided by legal counsel. Incidentally, most legal counsels with whom I have come in contact have not read the committee report and the legislative history of the law—they merely read the law and try to make an interpretation based on the language contained in it.

But, the existing practice and the force of the growing availability of the products of American communications technology generally work against a strict interpretation of the law as it is presently written. There is a need for some agreement between the proprietors and the consumers or users of information concerning the application of the fair use principles written into the 1978 law to leave in particularly audiovidual information that is broadcast through the air waves.

I propose that the guidelines for the application of the fair use concept in the copyright law concentrate on the question: How long can a recorded off air program be retained for instructional use by a non-profit educational institution. There are several alternatives that have been proposed.

A. In the position adopted by the board of directors of my own association last April—I'm sure most of you are familiar with it—the following is the description, "that the videotape and all duplicate copies be erased or otherwise destroyed within one calendar year of the original recording date."

B. In a newly developed position paper from a group of instructional media directors in the Washington/Oregon area of Northwest United States, the duration of use is described as follows: "Fair use for recording off the air programs extends 30 days from the time a program is broadcast and further extends until the program is available for purpose, lease, rental, or licensing." The position proposed by Charles Vlcek for that group in the Northwest is attached as annex 3.

C. Another proposal by the national association of State educational media professionals, a group which is comprised of the media coordinators in the State education bureaus of the fifty States, the duration of retention issue as described ". . . copyright releases that will give schools permission to record and use them throughout the school year in which they are broadcast."

To conclude, off air copying, using the hardware technology available to us in education, is a reality which must be respected by the copyright proprietor community as well as the educational community. It is the position of AECT that some accommodation should be reached whereby a reasonable set of guidelines for the copying, retention, and use of broadcasting audiovisual information so it can be more available for the instructional programs of our educational institutions. This recommendation is made with the full knowledge there is an inherent danger to the continued health of the community of small commercial firms who produce educational materials which are broadcast over the commercial or public broadcasting stations. It is our position that the needs of education, and the instructional programs at all levels of education and training override the proprietary interests of the broadcasting entities.

BIBLIOGRAPHY

Jones, Maryellen, "Media Survey," Unpublished Manuscript, Springfield, Ohio, January 1979.

Minutes of National Association of State Educational Media Professionals Meeting, December 7, 1978, Scottsdale, Ariz.

VideoPlay Report, Volume 8, No. 11, May 29, 1978.

Willis, John A., "The Use of Instructional Television in West Virginia Elementary Schools, 1977-78;" West Virginia Department of Education, October 1978.

CLINTONVILLE PUBLIC SCHOOLS,
Clintonville, Wis., February 5, 1979.

Dr. HOWARD HITCHENS,
AECT, 1126 16th Street NW.,
Washington, D.C.

DEAR DR. HITCHENS: I understand that you will be attending a March 3 meeting in Washington relative to establishing off-air taping guidelines.

As district coordinator of a school system interested in the educational use and value of instructional television, but one which is trying to live within copyright law, I would encourage your group to evolve guidelines for fair use within which we could live and the producers be satisfied.

These are some of the problems we face when a teacher notes a program pertinent to his classroom use:

1. Students can not view it at home in the evening because other family members either want another program or do not want to watch an educational program.

2. Many students are regularly employed and not at home when program is aired.

3. With the increased number of sports offered to girls, many of these are evening games. The teacher cannot ask a team member to skip the game and stay home to watch a TV program. The student would be dropped from the team.

4. Many of the homes in our district are not equipped to receive educational TV—I would estimate that 80 percent are not.

5. Good instruction calls for teacher previewing the program, introducing it to the class, viewing and discussing it. This is not possible at present. When I have written far in advance for permission to tape, I received no reply.

6. At times excellent programs are aired perhaps during the first semester and the subject is taught the second semester. Today that exposure is lost.

7. The purchase price of prepared video tapes makes them prohibitive to the average school. It is simple to cite the problems, but not necessarily the solutions. Humbly I suggest consideration of limited taping rights to 1 week to 6 months. Further consideration might be given to a blanket fee, although I would think the sponsors would welcome the increased audience exposure to the students.

If nothing can be accomplished at your conference, we will continue to conform to the present structure. However, with the home taping units being widely advertised, I feel reasonable people should be able to agree upon some fair use guidelines.

Yours truly,

Jane K. Billings,
District Coordinator, Library/Media Services.

AECT Adopts Working Paper on Off-the-Air Videotaping of Television Programming

The Association for Educational Communications and Technology (AECT) has adopted a working paper on videotaping of television programming which supports off-the-air copying of both commercial and non-commercial television by educators.

Copyright Law Resolution: Videotaping Television Programming (A Working Paper) was adopted by the AECT Board of Directors on April 21, 1978, at its meeting in Kansas City, Missouri. The paper includes recommendations to be used in implementing off-the-air videotaping of television programming.

"The proposed licensing procedures for duplicating television programming would impede fair use rights granted to educators," says Howard Hitchens, AECT Executive Director. "Our position on off-the-air videotaping reflects the educator's concern for providing students timely access to our best creative talents."

As stated in the position paper, the courts have historically promoted the fair use of materials by educators. The paper also points out that limited fair use of television programming is supported in the legislative history that accompanies the new Copyright Law.

AECT is the professional association of educators and others concerned with the improvement of instruction through the effective use of media and technology at all levels of education and training.

Copyright Law Resolution: Videotaping Television Programing (A Working Paper)

[Adopted by the Association for Educational Communications and Technology Board of Directors, Apr. 21, 1978.]

Most educators recognize the problems associated with the licensing of off-the-air videotaping faced by commercial television networks. These networks often do not own the rights to the programs they broadcast and, in those cases where they do own the rights, complicated arrangements must be made with various performance and craft guilds to release the programing. It is understandable that the networks are reluctant to pursue these agreements which would permit limited off-the-air videotaping of network programing.

While educators can sympathize with these and other difficulties, we also recognize that this reluctance on the part of commercial networks in many cases undermines the intent of the Copyright Act of 1976 in matters of fair use of television programing. Clearly, the legislature felt that limited fair use was applicable in this regard and they so stated in the legislative history that accompanies the new law.

In a broader sense, the Constitution of the United States indicates that copyright should promote science and useful arts by securing for limited times to authors and inventors the exclusive rights to their writings and discoveries. The courts have historically promoted the fair use of materials by educators. Yet, by failing to recognize fair use in off-the-air videotaping, television networks are depriving students and teachers fair access to a great deal of outstanding material.

Finally, any policy on off-the-air videotaping must reflect the realities of the technological advancements in the field of video duplication. The present ease with which off-the-air taping can occur and the anticipated advances in this field make it increasingly difficult to withhold this privilege from the consumer in general and the educator in particular.

With this in mind, the Association for Educational Communications and Technology supports off-the-air copying of both commercial and non-commercial television by educators.

1. The following recommendations shall exist as guidelines in the search for an equitable solution to the problem of implementing off-the-air videotaping:

(a) That off-the-air taping be initiated by the teacher [1];

(b) That sufficient duplicate videotapes may be made to serve the needs of the school, school district, college or university campus, or other recognized school unit;

(c) That the videotape and all duplicate copies be erased or otherwise destroyed within one calendar year of the original recording date;

(d) That the video tape and/or duplicate copies be used an unlimited number of times in the course of systematic instruction via face-to-face teaching or closed circuit television;

(e) That videotapes may not be lent, sold, rented or otherwise distributed beyond the confines of an individual school, school district, college and university campus or other recognized school unit;

(f) That a record be made of all programs recorded off-the-air by each particular school unit;

(g) If the educational institution determines the program has continuing educational value one year from the date of recording, it may complete a simple licensing agreement and pay a reasonable fee for each year the program is kept;

(h) That a fair and equitable license fee structure be established for the retention of copies beyond the one year of fair use;

(i) That programs produced with public funds and/or tax exempt donations remain in the public domain.

2. That an access mechanism be created to insure fast and simple licensing of programs kept beyond the initial privilege.

PROPOSED DEFINITION OF "FAIR USE" FOR RECORDING COMMERCIAL TELEVISION PROGRAMS

[By Dr. Charles Vlcek, director, and professor of instructional media, Instructional Media Center, Central Washington University, Ellensburg, Wash.]

BACKGROUND

The new Copyright Law implemented January 1, 1978 and corresponding legislative reports do not define the scope of "fair use" for taping off the air programs for non profit educational uses. However, the report of the House Judiciary Committee states:

"The committee believes that the fair use doctrine has some limited application in this area but it appears that the development of detailed guidelines will require a more thorough explanation than has so far been possible of the needs and problems of a number of different interests affected, and of the legal problems presented. . . . If it would be helpful to a solution the Committee is receptive to undertaking further consideration of the problem in a future Congress."

The committee left the development of criteria to measure "fair use" to the Copyright Office in cooperation with the producing and educational user groups. During the past two years the user and producer groups have met and worked on this issue but unsuccessfully.

RATIONALE

The funding level for education at all levels in the United States is presently critical. State funding and local tax levies have not been able to keep up with the increasing costs of education. Therefore, fewer materials are purchased instructional equipment is becoming obsolete, faculties are reduced, and faculty salaries are lagging behind other professions. It is time that society realizes that the education of the youth of this nation is not just the responsibility of the educational community. Education of the youth is the responsibility of the total society. Business and industries are beginning to accept this responsibility and are providing internships and work experiences in cooperation with schools for students. It is time the broadcast and producing industries accept their responsibility.

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[1] Concept of teacher . . . Broad enough to include instruction specialists working in consultation with actual instructors. Congressional Record, House of Representatives, September 22, 1976, page H10875.

PROPOSED DEFINITION OF FAIR USE

I propose the following definition of "fair use" be used for off the air recording of television programming for non profit educational purposes:

"Fair Use" for recording off the air programs extends thirty days from the time a program is broadcast and further extends until the program is available for purchase, lease, rental, or licensing".

Acceptance of such a definition by the producing industry would provide an outstanding source of programs for education—both commercial and public television programs. In exchange the educational community should be willing to provide market analysis data for producers. The producing industries could provide a simple form which would be required to be completed and returned to the producer or network each time a television program is recorded and/or used in a classroom for non profit educational purposes. This procedure would allow teachers to use programs during the day in classrooms and provide time to implement programs into their curriculum generally at the most appropriate time. If the market analysis indicates a program is marketable then the producers could make it available for purchase, lease, rental, or licensing. Licensing would be attractive because schools could retain the programs that they have copied at their expense and hopefully for a small licensing fee. The income generated by a low licensing fee may surpass the income generated through sales and without printing, inventory, advertising and mailing costs to the producer.

This policy will facilitate bringing outstanding and valuable instructional materials to the children of this nation at all grade levels and should provide an additional lucrative financial return to the networks, producers, and actors involved. Both the educational community and the film and television industries would be the gainers, but the real benefactors will be the children.

Therefore be it resolved that the following be considered as fair use guidelines:

1. "Fair Use" for recording off the air programs extends thirty days from the time a program is broadcast and further extends until the program is available to the educational community for purchase, rental, lease, or licensing.
2. Non profit educational users will provide market analysis data to the producing industry by completing a simple form provided by the producing industry each time a television program is used in the classroom.
3. Programs recorded will be limited to non profit instructional purposes.
4. Such programs may be distributed to classrooms via closed circuit television within an educational institution so long as it is for instructional purposes.
5. After thirty days from broadcast educational institutions agree to erase these programs after they become available for purchase, lease, rental or licensing.
6. The fees generated by this policy be distributed equitably within the producing industry.

Mr. **Bender.** Thank you, Hitch. I think the meeting is getting very interesting. I would like to make one observation. This is not a good time to be in the 11th day of a personal no-smoking campaign.

Our next presenter—I promise you, Barbara, though, I am not going to give up—is representing the interests of higher education.

Ken Warren is in Madison, Wis., and since January of last year he has been coordinator for a television production in media activities at the University of Wisconsin system.

I think Ken has excellent credentials to present the interests of higher education.

TESTIMONY OF KENNETH WARREN, UNIVERSITY OF WISCONSIN

Mr. **Warren.** Thank you, Ivan.

On behalf of those I represent, let me begin by expressing appreciation for this opportunity to provide information and viewpoints concerning the issue before us.

All units of the University of Wisconsin system are represented in an educational media council, by media services directors from each university institution. As liaison with that group, our remarks reflect council consensus on application of fair use principles to off-air recording of broadcast audiovisual works.

It has also been suggested, as I have indicated, that I convey representative concerns of higher education users in general. In preparing these comments, I found no disparity of views between the University of Wisconsin system and others with whom I was able to consult.

We are deeply concerned over the absence of detailed guidelines for fair classroom use of broadcast audiovisual works. This concern has two aspects: one, we want to obey the law, even though we're not always certain what it means; and two, we sincerely believe in our obligation as educators to provide learners with access to materials which can make study efforts more effective.

Educators consider broadcast audiovisual material as an effective and essential teaching medium. There is substantial interest in using instructional, documentary, and general educational radio and television programs for nonprofit, classroom use.

Restrictions on use of existing or emerging technology providing off-air recording and reuse capability present extremely difficult and frustrating situations. We can legitimately imagine instructors who wish to incorporate into their teaching plans programs from series such as Nova or Shakespeare, or from commercial networks and these at "the teachable moment" or even within a decent interval of time. We can also identify instructors and students being denied the opportunity of using these or other materials because of adamant and absolute refusal to consider application of fair use principles to off-air taping and limited nonprofit classroom use.

While anxious to see establishment of fair use guidelines that would provide reasonable access to and use of these materials, we also recognize the need to preserve creative and financial incentive for producers.

In other words, we are not suggesting a totally free ride for educational use. University of Wisconsin system users, for example, would be agreeable to an arrangement whereby fair use provisions would permit off-air recording and limited use until a program or series became available through commercial distribution channels. As we have heard, that can be a time span which could be up to a year or longer in some cases.

In our view it seems unreasonable for a producer to say in effect, "Buy it or forget it." We think it's unreasonable, and we also think it's shortsighted in terms of long range sales potential for a given work or product.

It works this way: An instructor learns of an existing work that is to be broadcast and thinks it may have value and relevance. The instructor can't watch or hear the broadcast, so inquires about having it recorded for later review and evaluation, but is told such practice is forbidden, probably even illegal.

The program is not otherwise available. Some of those enrolled in the instructor's class might be able to see or hear the broadcast, but that has limited value if all can't and especially if the instructor can't.

Results: Another potentially useful learning experience is lost; a producer has alienated a potential purchaser; and the broadcast has not been totally effective. For want of a nail——

I know of no valid information establishing direct correlation between allowing limited nonprofit classroom use and automatic loss of sale. I do know of several instances where enlightened self-interest on the part of a producer has resulted in eventual purchase with satisfactory experience for all concerned.

The kind of limited use—previewing it has been called—proposed by educators is, assuming quality of product, more likely to result in purchase than present situations severely restricting such use.

I said earlier, educators aren't asking for a totally free ride. We would be willing to negotiate a licensing system under which producers would be paid a reasonable royalty, and educators would have access to and use of materials considered capable of making instruction more efficient and effective. Models that come to mind in that category are ASCAP and BMI which license users of music for broadcast and live performance; and the Copyright Clearance Center which handles user requests for print materials.

Whatever the mechanism, whatever the statutory clarifications of fair use for off-air recording, it is readily apparent that the issue is critical. Off-air taping has been and is being done. And you had some documentation of it by the previous speaker.

It will continue and probably increase. One solution might be for my hypothetical instructor referred to earlier to invest in a Betamax and happily record anything, anytime, until Disney and Sony settle their differences.

I don't propose that. For one thing, I don't think we want to wait that long. For another, I am confident that user and producer groups, acting with enlightened and intelligent good faith, can reach a mutually beneficial, if not totally satisfactory, resolution to the issue we address today.

I would be pleased to respond to questions.

Thank you.

[Applause.]

[The prepared statement of Mr. Warren follows:]

STATEMENT OF KEN WARREN

For the record, my name is Ken Warren. I am the coordinator for television production and media activities for the University of Wisconsin System.

On behalf of those I represent, let me begin by expressing appreciation for this opportunity to provide information and viewpoints concerning the issue before us.

All units of the University of Wisconsin System are represented in an Educational Media Council, by media services directors from each University institution. As liaison with that group, my remarks reflect Council consensus on application of fair use principles to off-air recording of broadcast audiovisual works. It has also been suggested as I have indicated that I convey representative concerns of higher education users in general. In preparing these comments, I found no disparity of views between the University of Wisconsin System and others with whom I was able to consult.

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Restrictions on use of existing or emerging technology providing off-air recording and re-use capability present extremely difficult and frustrating situations. We can legitimately imagine instructors who wish to incorporate into their teaching plans programs from series such as Nova or Shakespeare, or from commercial networks, and use these at "the teachable moment" or even within a decent interval of time. We can also identify instructors, and students, being denied the opportunity of using these or other materials because of adamant and absolute refusal to consider application of fair use principles to off-air taping and limited nonprofit classroom use.

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In our view, it seems unreasonable for a producer to say, in effect, "Buy it or forget it." We think its unreasonable, and we also think it's short-sighted in terms of long-range sales potential for a given work or product.

It works this way: An instructor learns of an existing work that is to be broadcast, and thinks it may have value and relevance. The instructor can't watch or hear the broadcast, so inquires about having it recorded for later review and evaluation, but is told such practice is forbidden, probably even illegal. The program is not otherwise available. Some of those enrolled in the instructor's class might be able to see or hear the broadcast, but that has limited value if all can't, and especially if the instructor can't.

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Whatever the mechanism, whatever the statutory clarifications of fair use for off-air recording, it is readily apparent that the issue is critical. Off-air taping has been and is being done. It will continue and probably increase. One solution might be for my hypothetical instructor referred to earlier, to invest in a Betamax and happily record anything, anytime, until Disney and Sony settle their differences. I don't propose that. For one thing, I don't think we want to wait that long. For another, I am confident that user and producer groups, acting with enlightened and intelligent good faith, can reach a mutually beneficial—if not totally satisfactory—resolution to the issue we address today.

I would be pleased to respond to questions.

Thank you.

Mr. BENDER. Thank you, Ken.

The next three presentations divide the library community into logical segments.

When we were constructing the program, we spoke with Eileen Cook, and she felt that these three areas, although certainly overlapping in terms of interest, needed separate emphasis.

It pleases me, therefore, to introduce our first librarian, Mr. Philip Baker, who is coordinator of media programs at the Stamford public schools in Stamford, Conn.

TESTIMONY OF PHILIP BAKER, COORDINATOR OF MEDIA PROGRAMS, STAMFORD PUBLIC SCHOOLS, STAMFORD, CONN.

Mr. Baker. Thank you.

As several have said today, I too am appreciative of the opportunity to appear before this group, what is obviously a renewed effort to bring the voice of reason and commonsense and goodwill to bear on a problem which is often emotional, sometimes contentious and troubling to each of us.

I am reminded of the story of a Kentucky judge who told someone to go ahead and talk. He said, "It is easy for me to listen to you because my mind has been made up."

I have not sensed that kind of a priority decision in this room today, and that I am certain is progress.

While I speak today as a representative of the American Library Association, I carry with me as well a happy burden of being a professional educator actively involved on a day-to-day basis with my work.

My responsibilities as coordinator of library media programs takes me on a regular basis into the 23 schools serving the 17,000 students who comprise the Stamford public schools in Stamford, Conn.

My primary concern and first priority of our school library media program is to support the school's instructional program. To do this we use a wide array of the media ranging from books to reality and the equipment used with them to make them useful.

One important instructional medium is television, but it is by no means our most important or used medium of instruction. We have available in 12 of our schools video-cassettee recording devices.

This underscores by the way the fact that our severely restricted equipment budget prevents us from too intensive involvement in an extensive off-air videotaping program.

I doubt, for instance, that any of you in this room have recently tried to schedule fifth, sixth grade classes at any one time to use one videocassette on the program cover to cover.

I suggest that that is where the reality of off-air taping often comes to the fore. This is how school buildings do run themselves.

That, though, is not the issue, for our need to establish our right to access to even one appropriate instructional television program must be established if we are to exercise that right when appropriate.

The only use we make of off-air videotaping is upon specific teacher request. And this must relate to a specific instructional unit.

Our subscription to channel 13, a marvelous bargain for us, we believe, allows us to off-air tape some shows for use during the duration of the school year. But many others may be used for 7 days only, and so may not be taped at all.

Of course in the present limbo of copyright fair use, access to videotaping of programs from NBC, ABC, CBS, are not available at all.

I believe that for most schools, a prompt definition of fair use is the most important matter to be settled. In the world of print fair use is well defined by the new copyright law, and despite some problems and interpretations—and I assure you, some real confrontations in the Xerox machines in some of the school library media centers—we are learning to live within the constraints imposed by the law.

Most teachers and most citizens want to obey the law, but they must know what the law is and understand how it applies to them.

In its present lack of definition about what fair use is, video copying is mischievous and serves no good purpose for any of us. No school districts that I know of have gone into the business as PBS so recently showed us of pirating movies for underground sales or contemplates a massive or extensive permanent library of pirated tapes from commercial broadcasters.

Such a library is relatively costly to maintain, and its distribution for use represents management problems for most school districts already understaffed and pressed to deliver too many services with too few resources. Most districts I know would be content with a fair use definition which allows them to off-air tape a program for retention and use up to 90 days, let us say, for the purpose of discussion; then to be erased.

Since nearly all requests for videotaping are spontaneous, at least from my field, in that they orginate in a 24-hour period prior to the origination, this seems consonant with the spirit of the law.

While doubtless there are exceptions, most systems that sponsor extensive media library programs place a first premium on their 16-millimeter film library. We do.

For instance, it accounts for about $25,000 of a total of $200,000 spent last year on instructional media in the Stamford public schools.

By the way, this is out of a total school budget of $39 million, So this gives you an idea of the pecking order which the media program combines in the school.

This is a concern, something we all should share. We have less money to buy what is being produced. Our use of video is specifically target. For instance, the PBS program "Bread and Butterflies," which we off-air tape for use with our career education programs at the middle schools—by the way, our contract with WNET, channel 13 allows us to tape and retain these for 1 year, then erase them, which we will do—recent quasi-news shows such as "This He Claims" present, however, a dilemma.

For instance, to tape Frank Reynolds' fascinating and instructional hour show on the eclipse is illegal, I guess, but can we seriously expect to enforce copyright infringement action on all the teachers who spontaneously and with intent to use fairly taped this show, use it for one 24-hour period as a vital and timely instructional tool, and then erase it? Surely, I do not believe this was the intent of Congress when Public Law 94-553 became law.

Fair use to use must provide some reasonable access to regular television programing. Certainly, no access at all can hardly be considered fair use.

Parenthetically, let me say that I agree with several speakers who have, as the day developed, spoken for the need for networks or consortia. The recently released study by the National Commission on Libraries and Information Sciences on Networking and School Library Programs speaks specifically to this issue of securing licensing agreements through the vendors to large areas.

To go on a building-by-building or district-by-district basis to attempt to establish any of these licensing arrangements will be an impossible situation. Money for schools for all of us in publicly financed enterprises is monstrously tight and doubtless it will become tighter.

Even if the inclination to pirate with total disregard for laws with present funding for such would not permit it.

I believe that commonsense and realistic values can be applied to the situation and that the schools libraries and public libraries can be guaranteed reasonable access to the same spontaneous and fair use doctrine we apply to the world of print.

I do not believe that the present or future consequences of off-air videotaping are as disastrous as its most vociferous opponents would have us believe, nor are they as innocent as the most devoted proponents of unlimited access would suggest.

This morning, Congressman Kastenmeier commented that "lawsuits are not consistent with the intent of the copyright law."

We are all anxious to be good citizens and to begin the promise of compromise and negotiations that will lift this particular problem which we each share and allow us to move ahead to the more important issues facing us.

Thank you.

[Applause.]

Mr. BENDER. Thank you, Phil.

Our next librarian representing college libraries is Judy Sessions. She is currently director of the Learning Resources Center at Mount Vernon College here in Washington. And in her activities in connection with the American Library Association, she serves on their information technology section committee on legislation and regulation.

TESTIMONY OF JUDY SESSIONS, DIRECTOR, LEARNING RESOURCES CENTER, MOUNT VERNON COLLEGE, WASHINGTON, D.C.

Ms. SESSIONS. I too would like to thank the chairman, Congressman Railsback, for the opportunity to participate in this conference and present the view of a director of a learning resource center.

To define terminology in my case, the learning resource center incorporates the traditional functions of a library with additional media functions.

We have darkrooms and photography studios. We have a television studio and audiolab, a graphics workshop, AV stations for viewing and listening, a film production lab, and even an electric piano.

A substantial portion of our holdings is in the audiovisual format. These include microfilm, audiotapes, audiocassettes, records, 16-millimeter film, videocassettes, multimedia kits, slides, everything you can think of.

These things we catalog include in our catalog just line print materials and they can be checked out. They set on the shelves with everything else. We are fully integrated into the world of media.

We also rent films and videotapes when they are not available to buy, one, because we just can't afford it or, two, when we feel like the professor is uncertain as to the value of this for the permanency of the collection.

So all these issues we are talking about today really involve me. And in policy decisions, I copyright only for my college, my association, and copyright controversies, not basically as a policymaker, but as someone who daily tries to apply to the law to a given situation.

This is the situation of many of our 35,000 members in the American Library Association.

By definition, the major goal of a college library is to provide students and faculty with access to knowledge which supports education and research.

It has been many years since libraries as knowledge warehouses were limited to storing print materials alone. As technology has produced new formats of information, libraries have quickly obtained necessary hardware and begun acquiring appropriate software collections.

Libraries are in the forefront of technological application to knowledge transfer, dissemination, and use. If we are to serve our institutions well, we must make information accessible, regardless of format.

Today of course we are here to limit our discussion to off-air recording. You have already heard the needs of instructors and proprietors, and I don't want to list those again, although I had originally planned to do so.

Librarians are caught in the middle. We are the people that they go to to get the information. We are the people who have to explain to everyone why they can't have the information. So it is kind of a unique situation for all of us.

Let me tell you that libraries around this country are attempting to formulate functional policies which are consistent with the intent of a copyright law. We believe there is very little conscious abuse of the off-air taping. What we have found is confusion and frustration, and I would like to share some of those with you today.

Because of a lack of guidelines, I have been able to locate the college libraries which have totally quit doing any off-air taping. They are sitting there, and they are waiting for the guidelines, and they are waiting because they don't want to be the dreaded test case.

And it is a very valuable function that is being stymied because of a need for more concise guidelines.

Other libraries have developed conservative policies which allow faculty members to request all off-taping of the particular program, the copy to be held for 7 days, to be viewed by the instructor and/or his or her students in the library or classroom.

After this 7-day period, if the professor indicates that the program should be retained as a part of the collection, then the library staff begins what can become an ordeal or which may be just simply a very simple ordering function.

Some of our problems when we try to order the program are we get back the information that it is not available. Then we have to explain to a faculty member who thinks this is very important, valuable information, in the first place, that they cannot legally have it.

Or we find out that it is available. We don't have any problems. We erase our copy that we have made, and it is not until 6 months later that the authorized copy comes in the mail, which is many months past the time that they intended use or at least the intended initial use of a program was.

Frequently we write letters that just never get answered. And then what are we supposed to do? Keeping writing letters to an address you get no answer from? Do you erase it because no one will say no, you can't, but no one will say, yes, you can.

So we are in that position directly, although let me admit it is not as frequent as it has been. People are beginning to answer letters.

One of the other things we found was a documentary, 30 minutes, the price, $1,800. In an era of limiting and sinking budgets, $1,800 for a 30-minute documentary is not access. I mean, we were better off when they said we couldn't have it at all than those outrageous prices.

Additionally, the 7-day limit is not workable. And that is when you try to explain to someone they can only have it for 7 days, they don't understand if their class is 9 days or the class on death isn't meeting until next semseter; there is a good probability they can't get this material at all.

We need to do something with guidelines so that material that is valuable, that has a lot of knowledge to impart, can be there for the student and the instructor when it is needed.

I could easily go on with problems, but a litany of complaints is not very constructive.

I also have a time problem, I think.

My point is that problems are today's reality. A lot of you talked about hopefully we will be able to do this, and maybe we will be able to do that, but think about people like me. What are we doing today? What are we supposed to do? We don't reallv know.

And I think from a lot of the comments today you wouldn't really have the answer either, exceot maybe to tell me to ouit everything, which I don't think I would accept at all.

My main point is that knowledge must be made available.

What we are asking for is access with a reasonable price tag and within a reasonable amount of time.

The American Library Association looks forward to participating in meetings which will resolve today's impasse.

Let me say I didn't come forward with any concrete list and say, "This is what we want, want, want." We are going to go into those meetings in a spirit of compromise, and we hope all of you will do so, too.

Thank you.

[Applause.]

Mr. **Bender**. Thank you, Judy.

Well, I guess those of us who thought that librarians were only concerned with photocopying have been enlightened to some extent this afternoon so far.

The final librarian that we will hear from today is Lynne Bradley, who will be representing the interests of public libraries. She is a video librarian in the District of Columbia public library system and is currently chairperson of the American Library Association's video and cable communications section.

TESTIMONY OF LYNNE BRADLEY, CHAIRPERSON, VIDEO AND CABLE COMMUNICATIONS SECTION, AMERICAN LIBRARY ASSOCIATION

Ms. **Bradley**. Thank you.

I think that I know how NBC felt this morning, coming as the last of kind of a tripartite.

I, too, want to thank the subcommittee and Copyright Office for convening this meeting and giving us the opportunity to participate.

Because of the limited time, I can only highlight some of our concerns. But I do want to emphasize that the public librarians would concur and support the issues, and we have the same, very much of the same, problems that school and college libraries have in this important issue.

As chairman of the video and cable communications section of the American Library Association, I want to make it clear that our members, who number about 1,000 librarians who are specifically concerned with video and cable utilization in all types of libraries, are very anxious to have the issue of the fair use of off-air recording resolved.

We are anxious to see this dialog and the exchange of information continue, and will continue in these negotiations to help define reasonable fair use of off-air recording.

I am also anxious to speak to you as a public librarian. The nature of the current law has for some reason caused public libraries to be excluded from some of the existing off-air recording policies. Notably is the PBS policy. We hope that the development of future guidelines will include public libraries as educational institutions.

Public libraries not only provide services to individuals whom include students and teachers in formal educational programs, but we are involved in some cases with cooperative public and school library networks and facilities.

For example, we have a combined branch of the District of Columbia public library that is the school library, and the facility is within the school installation.

Further, the variety of informal and independent learning situations that is already done daily through public libraries will further be an important resource as demands for life-long learning increase.

We also want to emphasize that librarians of all types are trying very hard to inspect and follow the copyright requirements. We acknowledge the proprietary rights of copyright owners and the program creators. As a matter of fact, many librarians are now producing their own video programing and very well understand the protectiveness that a creator has for his or her product.

Our jobs are to disseminate information. Our first priorities are to provide materials for our library patrons.

Limited-air use of off-air recordings should acknowledge the rights to information we have in this country. We are not looking for a free ride. Across the country we spend every penny of our crimped budgets on video tapes and other media. Yet, we feel there still remains a reasonable and what should be a legitimate role for off-air recording.

I agree with the earlier gentleman who pointed the need for clear guidelines so that we may continue our jobs at maintaining access to this type of information.

There are many points that I think we agree on. We believe that the growth of new technology will continue to multiply. Proprietors and users alike obviously are agreeing that the role of television and other media is and will continue to be an integral part of the educational process.

I would agree also with Mr. Popham of the NAB that the use of local programs in library services is an important area that should also be discussed. We need to develop guidelines that will encourage understanding between local broadcasters, local producers, and local libraries, especially public libraries, on how access to these materials can best be facilitated for information and research purposes.

These local programs are a very important resource in local archives and library collections and something that the members of our section repeatedly point to as a major problem in getting access to these programs.

For example, we appreciate guidance on our rights to the access of the recent broadcast of the inauguration of the District of Columbia's new mayor, Marion Barry. We were told we were the only customer for that program.

Because of the time, I will not go into detail of all of our problems. But I will say that in considering future guidelines, these variables might be considered to help design limited fair use or to develop a formula for limited fair use.

The length of time the program is to be held. I think that our users understand that the 7-day limit is not flexible to respond to their needs. The number of persons in the audience and the number of times a program is shown.

These are just a few suggestions and preliminary recommendations which we will be glad to expand more in future negotiations.

I thank you and look forward to our continuing discussions and exchange of information.

[Applause.]

Mr. **Bender**. Thank you.

When I said a few moments ago our last librarian was now going to make a presentation, I think I should have thought ahead to the next presentation, which will be on behalf of the interests of archivists, who perhaps occupy in some respects quasi-librarian riles.

We are fortunate to have with us today Mr. Robert Rosen, who has come here to join us from UCLA and tell us about the operation that that institution has in the area of television archives and other interests of archivists, in general.

TESTIMONY OF ROBERT ROSEN, DIRECTOR, TELEVISION ARCHIVES, UNIVERSITY OF CALIFORNIA

Mr. **Rosen**. I am director of ATAS, UCLA television archives. The Academy of Television Arts and Sciences—that is ATAS—and UCLA for 12 years have worked in a cooperative effort, real cooperation in this instance, real representation of an industry and university, in the collection of television materials so that now over the course of that time we have accumulated holdings of approximately 13,000 television shows, dating from the 1940's to the present, making it probably the largest independent, nonprofit archival collection of that sort, not directly affiliated with the Federal Government.

I would like to stress each of those words—nonprofit, educational, archives—a very specific function.

An archive is in many ways different than some of the other institutions that have been talked about today. But I should also like to stress that we are not unique in being in that position. UCLA has been involved in this for 13 years, but so, too, has the University of Wisconsin that has important television holdings, an important television archive. The University of Georgia holds the Peabody Collection. There are other more specialized types of archival activities taking place in the country dealing with television as well.

You are, of course, fully aware of the Vanderbilt news collection. And then, there is the specialized public access facilities that the Museum of Broadcasting operates in New York.

Although in the very broad sense the archives share many of the educational goals that have been articulated today, there are a number of specifics, I think, that have to be articulated that should be taken into account when guidelines are drawn up. And some of these specific requirements should be underlined.

The archive is in a peculiar position, and it is a unique position. In some ways, it is a mediator. We would not have 13,000 shows it if wasn't for the cooperation of the copyright owners and if it wasn't for the cooperation of the networks and it if wasn't for the cooperation of the people in the industry.

On the one hand, we look toward the industry and in many ways serve certain of their functions, but at the same time a fundamental commitment as a repository for the culture as to the public, as to the people. So, the function of an archive is an intermediary on the one hand, serving a broad-based population, serving the interests of a culture, and of a Nation, and at the same time doing so in a way that does not directly threaten but in fact may even be supportive of many of the interests of the copyright holders.

In order to specify more concretely the way that the archive functions and its particular needs, I would like to break down the archives committees into three domains: the areas of acquisition, preservation, and then controlled access. All three are essential.

First, the area of acquisition. An archive such as the one we have at UCLA is not concerned with acquiring a very small and limited number of shows for immediate use at a specific time, but rather it is attempting to accumulate a broad-based, widely disparate range of materials that are indicative of the quality of the culture, and can be passed on to future generations.

It plays a historical role on the assumption that learning from the past is an activity in the present that sets an agenda for the future. It has a long-term function.

Over the course of the years, we have acquired these materials from many sources. We have rushed in as local television stations were about to dispose of hundreds of television shows in the trash because of the need for some extra space in the back room.

We have gotten them from television personalities who look, I think, understandably for a certain place in history. We have gotten them from the production companies themselves, a whole wide range of sources.

But no, not every one of these sources has been the copyright owner. Nonetheless, the principal way an archive functions is: Having acquired that material, it is dealt with with full respect for the copyright owners.

That is to say, there is no circulation of the material outside of the archive. The multiple copies are not made. The material never leaves the archive premises without the special permission, written permission, of the copyright owners.

More than that, in many instances this has been of advantage to the copyright owners. When NBC, for example, and ABC were putting on the historical retrospectives, many of the materials no longer existed in their vaults and, indeed, no longer existed anywhere else in the world except at UCLA.

The archives plays a function in relationship to the society and a function in relationship to the industry.

Now, in our view, within an archive, off-the-air taping should be viewed as an extension of that acquisition activity. The off-air taping is not for multiple copies. It is not for circulation. But it is part of that effort to acquire and make in a very controlled way the fruits of our culture accessible to people and to pass them on to the future.

So some special recognition, it would seem, in the formation of law has got to be made for the archives in the area of off-air taping.

A second function of an archive is maintenance and preservation. Preservation to an archivist means something slightly different than it does, I think, to the lay person. It is not simply storing the materials away. Preservation means you are trying to get the very best copy and hold onto it for the longest possible period of time on the medium that is the most stable.

Now, in the workings of an archive, in-house copying is an absolute necessity. When you get materials on unstable 2-inch tape, for example, that is oxidizing, it is a requisite if you are going to pass it on, you transfer it, at the very least, as a holding action to a three-quarter cassette, ideally to a more stable form.

When you have a one-of-a-kind kinescope that is a last existing copy anywhere in the world, it is requisite that in order to access that material, see what you have, that a single copy be made. We are talking here about a master preservation copy, and we are talking about a reference copy.

This kind of in-house copying is part of what is involved in preservation. It is not just putting it back in the closet.

And once again, some recognition of this particular archival function has got to be made in any guidelines. This, of course, would apply as well to materials taped off the air.

It would be, one, at the same time a master preservation copy that is not used, and a single reference copy.

Again, I point to the fact that we are talking only about those two copies, not multiple copying, not wide distribution.

OK. The third area of an archivist has to do with controlled access. And I put stress upon both words, the access and the control.

Let me restate the mediating role of an archives between the producers on the one hand and the public on the other. And each has a legitimate claim. The archive is in a position to speak to both.

On the public side, it seems that there is a claim not merely based diffusively on education, but even, it would seem to me, based on a requisite for democracy.

Television, it is perfectly clear, is not a passive instrument within American society. It is an omnipresent force that enters our lives in many ways.

If in a democracy discussion takes place that leads to reasoned collective activity, information and knowledge is requisite. So, the public, it would seem, would have reason to go to some sources in order to look at the record.

Public acts, for example, we can go to the public record to examine. What goes out over the public airwaves, for example, it is very difficult for people to examine.

Thus our role is not simply education in a narrow sense of higher education or secondary school education, but, broadly speaking, public education.

It is a place, for example, for a city councilor in Los Angeles to be able to come and look at the way that, for example, minorities have been depicted over time in the media. It is a place, for example, for a veterans organization to come and see depiction of patriotism, or PTA to examine violence, or consumer advocates to look at commercials.

It is a requisite part of a functioning democracy to have access to this kind of material.

Now, again, the access is delimited and controlled. We are not talking of multiple copies. We are not talking about distribution. It would seem to me that if there is a cost to the copyright owner of providing access in a limited number of archives across the country to these materials, I don't see it.

If there is a cost, it is an infinitesimally small one, and when balanced against the vast public use in being able to examine and look at a force within our society up close and when weighed against other possible more capricious systems of distribution, I think it is one that is well worth it and should be specifically recognized and noted within any guidelines that are established.

Thank you.

[Applause.]

Mr. **Bender.** Thank you, Bob.

Before I forget, just one item. I would like to ask Phil Baker and Bob Rosen and Charles Adams—is he still here? I guess he is gone—Phil and Bob to see me right after we adjourn.

The next two presentations will be provided by two of the performing guilds, Screen Actors Guild and the American Federation of Television and Radio Artists.

I might add that both the Directors Guild of America and the Writers Guild of America were invited to participate, but due to unavoidable conflicts of scheduling and other reasons, neither of those organizations could be represented here today in person, although I do think that perhaps either John McGuire or Mr. Wolff will be, in essence, representing the interest of those two guilds as well.

I would first like to present to you John McGuire. John, I believe, is executive director, he is probably an officer, of Screen Actors Guild.

I am sorry, John, I don't have your title, but you enlighten us.

TESTIMONY OF JOHN McGUIRE, EXECUTIVE SECRETARY, SCREEN ACTORS GUILD

Mr. **McGuire.** I am the executive secretary of the Screen Actors Guild in New York. I am also speaking on behalf of the Writers Guild East and the Directors Guild East today.

The Screen Actors Guild is a nationwide union. It represents actors who work in the areas of television commercials, feature motion pictures, television programs, and industrial educational films.

The Guild, on behalf of those members, negotiates collective-bargaining agreements with a series of employer groups and, in negotiating those agreements, establishes what are the minimum working conditions, the minimum pay scales for the basic work and the minimum pay standards when that work is replayed or when it is released into what we call supplemental markets.

It is those payment scales for replay and supplemental markets which generates our interest in the topic of off-air recording.

Now, on the subject of off-air taping on television for educational purposes, we are immediately confronted with a problem in semantics. I am referring to the concept of "fair use." The very existence of the term implies that there is such a thing.

Now, I don't intend to suggest that there isn't, but speaking on behalf of the Screen Actors Guild, the Directors Guild, and the Writers Guild—those people who are largely responsible for the creative concept and development of such programs—I must ask: "Fair to whom?"

Much of the discussion on this subject centers around the end result of this concept—the use of such off—air tapings in classrooms for educational purposes. It is of course, easy to cite many arguments in support of such use, and I wish to make it clear at the beginning that the actors, writers, and directors do not oppose the use of their creative output in this manner.

In fact, they realize that the use of television and audio/visual material in general for educational purposes—helping to mold the character of future generations for the better—may well represent the finest possible use of the products we help to create.

So, we are not opposed to off-air tapings for educational purposes.

And we are not opposed to fair use.

What we are saying is that the word "fair" needs to be defined and that some mechanism for "use" needs to be worked out in accordance with that definition.

Let me take just a few moments of your time to discuss a little of what has taken place before the material in question has been aired in the first place, before it has become available for off-air taping.

The Screen Actors Guild—as the duly constituted union for the performers—has negotiated a collective-bargaining agreement with the producers of such shows. If the program is to be aired on television, the agreement covers the proper reimbursement of the performers for that use.

If the program is to be subsequently used for other purposes—including educational use—our agreement would call for additional compensation, no matter how minor, to the performer. This is an agreement that we have entered into in good faith with the company that has produced the program, with the knowledge that the company has protected the program under the copyright laws and that we can depend upon the company to honor the agreement.

Suddenly, however, that program is taped directly off the air and it is being used for educational purposes around the Nation. The producer, having received no money for such use, informs us that he is unable to honor his agreement with the performer, and it is at this point that we must ask, "Is that what fair use is all about?"

It is not that we are objecting to educational use as such. What we are asking is whether a doctrine which can be used to circumvent the protection of a copyright and negate a good-faith agreement can really be described as "fair."

I must point out at this time that the use of taped materials off-air is not of inconsiderable economic importance to the performer, incidentally, since there is an entire field of audio/visual production devoted to education and many members of the Screen Actors Guild receive a major share of their annual income from such productions; these are productions made exclusively for the educational field.

It should be obvious that any material taped off-the-air and used in classroom is in direct competition with films made specifically for classroom use. This is a situation which is totally unacceptable to the acting profession because it means that performers who are not being paid for their services—those whose work has been taped off-air in violation of the spirit at least of their collective-bargaining agreement—have been placed in the position of taking away employment opportunities from their colleagues.

As to the Writers Guild East and the Directors Guild East, both of which have asked me to convey their thoughts on this subject, I would enter for the record the fact that they subscribe to this position fully. They, too, have negotiated their agreements in good faith with production companies. And they, too, feel that off-air taping which circumvents the protection of copyright is a violation of that good faith.

The Writers and Directors have, however, asked me to point out another dimension of this problem to you, and that is that their agreements invariably cover not only the economic aspects of the production, but the creative concept as well.

In other words, while the writer and director have reason to expect additional compensation for educational use, they also have an agreement which prohibits the cutting and editing of the material without consultation.

This is not a case of creative vanity. It is rather an attempt to safeguard the integrity of the program, to insure that its message is not distorted.

The off-air taping of segments of programs—including, for example, comprehensive documentaries which have been carefully planned in their entirety to present a fair and well-rounded presentation of all the facts—provides the Writers Guild and the Directors Guild with an area of grave concern.

But where does this all leave us?

Congressmen Kastenmeier and Railsback, in their letters convening this conference, expressed the hope that upon its conclusion we will be able to continue these discussions in detail, leading to the publishing of guidelines by the subcommittee "within a few months."

The Screen Actors Guild, the Writers Guild, and the Directors Guild pledge to do everything within their power to help accomplish that aim. We do not intend to be obstructionist in any way. Rather, we hope to be able to outline an approach that will make these guidelines successful.

As we see it now, we must oppose any general, compulsory, licensing agreement since the monetary return would be so meager to the performer as to completely cancel out the advantages of any collective-bargaining agreement.

Accordingly, we are currently recommending that any licensing plan must be limited to 1-week use of the material and that if the material is to be retained and used beyond that period the party involved must negotiate with the holder of the copyright.

We also believe that firm guidelines must be worked out as to what type of programs can be taped off-air for educational purposes, probably placing a time limit of no more than 1 hour, for example, on any particular program and completely exempting such material as feature motion picture films.

I also evision that part of any such licensing agreement would include the requirement that educational institutions sign a "fair use" pledge which would include a commitment to use all material in a manner which would not distort its message.

It is, of course, questionable just how enforceable such a pledge might be, but it would at least serve as an indication of good intentions. Something similar might be found in the current CB licensing agreement which calls upon the civilian broadcaster to voluntarily observe certain rules of conduct on the air.

Finally, let me say in outlining our basic thoughts on this problem that our position is firm, but not frozen.

All of us associated with the television industry in any manner recognize the great responsibility placed upon us to see that this medium is used to its greatest advantage. We know that it can be a vital factor in helping to educate our young and in establishing the character patterns that can well determine the future of our society. We do not take this responsibility lightly.

We are eager for the opportunity to be a continuing part of the educational process. We only ask that in terms of "fair use" our definition of "fair" receive full consideration.

And I would just like to thank the committee, not just for holding this conference and for the Copyright Office, but for taking the steps to involve the performing and creative guilds in this process, because we have important interests at stake in this. We have income that is vital to our membership which is affected. And we want to have our interests heard and to work with others to solve the problem.

Thank you.

[Applause.]

[The prepared statement of Mr. McGuire follows:]

STATEMENT BY JOHN McGUIRE, EXECUTIVE SECRETARY, SCREEN ACTORS GUILD, NEW YORK BRANCH SPEAKING FOR SCREEN ACTORS GUILD, WRITERS GUILD EAST; DIRECTORS GUILD, EAST

Mr. Chairman and Members of the Committee: In approaching the subject of off-air taping of television programming for educational purposes, we are immediately confronted with a problem in semantics. I am referring to the concept of "Fair Use." The very existence of the term implies that there is such a thing.

Now I don't intend to suggest that there isn't, but speaking on behalf of the Screen Actors Guild, the Directors Guild, and the Writers Guild—those people who are largely responsible for the creative concept and development of such programs—I must ask "fair to whom?"

Much of the discussion on this subject centers around the end result of this concept * * * the use of such off-air tapings in classrooms for educational purposes. It is, of course, easy to cite many arguments in support of such use and I wish to make it clear at the beginning that the actors, writers, and directors do not oppose the use of their creative output in this manner.

In fact, they realize that the use of television and audio/visual material in general for educational purposes * * * helping to mold the character of future generations for the better * * * may well represent the finest possible use of the products we help to create.

So, we are not opposed to off-air tapings for educational purposes.

And we are not opposed to fair use.

What we are saying is that the word "fair" needs to be defined and that some mechanism for "use" needs to be worked out in accordance with that definition.

Let me take just a few moments of your time to discuss a little of what has taken place before the material in question has been aired in the first place; before it has become available for off-air taping.

The Screen Actors Guild—as the duly constituted union for the performers—has negotiated a collective bargaining agreement with the producers of such shows. If the program is to be aired on television, the agreement covers the proper reimbursement of the performers for that use.

If the program is to be subsequently used for other purposes—including educational use—our agreement would call for additional compensation, no matter how minor, to the performer. This is an agreement that we have entered into in good faith with the company that has produced the program, with the knowledge that the company has protected the program under the copyright laws and that we can depend upon the company to honor the agreement.

Suddenly, however, that program is taped directly off the air and it is being used for educational purposes around the nation. The producer—having received no money for such use—informs us that he is unable to honor his agreement with the performer and it is at this point that we must ask, "Is that what fair use is all about?"

It is not that we are objecting to educational use as such. What we are asking is whether a doctrine which can be used to circumvent the protection of a copyright and negate a good faith agreement can really be described as "fair."

I must point out at this time that the use of taped materials off-air is not of inconsiderable economic importance to the performer, incidentally, since there is an entire field of audio/visual production devoted to education and many members of the Screen Actors Guild receive a major share of their annual income from such productions; these are productions made exclusively for the educational field.

It should be obvious that any material taped off-the-air and used in the classroom is in direct competition with films made specifically for classroom use. This is a situation which is totally unacceptable to the acting profession because it means that performers who are not being paid for their services—those whose work has been taped off-air in violation of the spirit at least of their collective barganing agreement—have been placed in the position of taking away employment opportunities from their colleagues.

The Writers and Directors have, however, asked me to point out another dimension of this problem to you and that is that their agreements invariably cover not only the economic aspects of the production but the creative concept as well.

In other words, while the writer and director have reason to expect additional compensation for educational use, they also have an agreement which prohibits the cutting and editing of the material without consultation.

This is not a case of creative vanity. It is rather an attempt to safeguard the integrity of the program; to insure that its message is not distorted.

Off-air taping of segments of programs—including, for example, comprehensive documentaries which have been carefully planned in their entirety to present a fair and well rounded presentation of all the facts—provides the Writers Guild and the Directors Guild with an area of grave concern.

But where does this all leaves us?

Congressmen Kastenmeier and Railsback—in their letter convening this conference—expressed the hope that upon its conclusion we will be able to continue these discussions in detail, leading to the publishing of guidelines by the subcommittee "within a few months."

The Screen Actors Guild * * * the Writers Guild * * * and the Directors Guild pledge to do everything within their power to help accomplish that aim. We do not intend to be obstructionist in any way. Rather we hope to be able to outline an approach that will make these guidelines successful.

As we see it now, we must oppose any general, compulsory, licensing agreement since the monetary return would be so meager to the performer as to completely cancel out the advantages of any collective bargaining agreement.

Accordingly, we are currently recommending that any licensing plan must be limited to one-week use of the material and that if the material is to be retained and used beyond that period the party involved must negotiate with the holder of the copyright.

We also believe that firm guidelines must be worked out as to what type of programs can be taped off-air for educational purposes, probably placing a time limit of "no more than one hour", for example, on any particular program and completely exempting such material as feature motion picture films.

I also envision that part of any such licensing agreement would include the requirement that educational institutions sign a "Fair Use" pledge which would include a commitment to use all material in a manner which would not distort its message.

It is, of course, questionable just how enforceable such a pledge might be, but it would at least serve as an indication of good intentions. Something similar might be found in the current CB licensing agreement which calls upon the civilian broadcaster to voluntarily observe certain rules of conduct on the air.

Finally, let me say in outlining our basic thoughts on this problem that our position is firm, but not frozen.

All of us associated with the television industry in any manner recognize the great responsibility placed upon us to see that this medium is used to its greatest advantage. We know that it can be a vital factor in helping to educate our young and in establishing the character patterns that can well determine the future of our society. We do not take this responsibility lightly.

We are eager for the opportunity to be a continuing part of the educational process. We only ask that in terms of "fair use" our definition of "fair" receive full consideration.

Mr. BENDER. Thank you, John.

Sanford Wolff is executive secretary of AFTRA.

And I guess you have the envious position, perhaps, of being the last formal presenter.

TESTIMONY OF SANFORD WOLFF, EXECUTIVE SECRETARY, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Mr. WOLFF. I hope not, because I think like all of you, and that is really my primary reason for being brief, I want to hear from Ms. Barbara Ringer. So, I shouldn't be the last.

Second, there is very little—I know so many of you and have dealt with you—I can say no matter how long I take that is going to provoke sincere applause.

I think all of the previous speakers have first addressed themselves to their dedication to education and the public good. We agree with that. None of us has a monopoly on good citizenship.

Second, you have then launched into a much more detailed defense of your own enlightened self-interest. And we agree with that.

Mostly and most significantly, we agree by bargaining in good faith, we can overcome whatever obstacles there may be. I have no doubt about it.

I would like to pronounce one caveat. The previous speaker warned us of the consequences of impasse. Don't do that. You may have to reestablish your bona fides before going into negotiations.

I thank you for inviting us. We are determined to work with you in attempting to solve the problem. Thank you. [Applause.]

Mr. LEHMAN. Well, we are almost done with our work, except, perhaps, for the best part. Anyone who has been involved in copyright law for any length of time throughout the entire world is familiar with our next speaker, our concluding speaker.

We began this morning with the father of the new copyright law for the largest producing Nation of copyrighted works in the world, and now we are going to conclude with the mother of the copyright law, a copyright law which, largely because of her efforts during the last 15 years or more before she was register of copyrights, as a lawyer in the Copyright Office, is a great monument to public service.

In fact, if any of you have read the recent 1,000-page report of the Copyright Office on performance and sound recordings, a totally different issue, Chairman Kastenmeier, in his introductory statement, refers to Barbara Ringer as the "highest example of public service that the U.S. Government permanent cadre of executives and workers has to offer."

I think that that is a completely accurate statement of her abilities and her contribution. And we are really happy that she can be here with us today and that she can sort of tie up all of the things that have been said and guide us toward the future.

Before going on to hear Barbara, I just want to mention something about the negotiating committee which we have heard so much about. That committee will be announced not today but within, I would say, the next 10 days or 2 weeks. And since we have a mailing list, every one of you will get notification in the mail.

And it will include representatives of all of the affected groups, which will include the copyright proprietors, the guilds, the broadcast networks, public broadcasting, and librarians.

And we hope to have that information with you as soon as possible so that we can go on with the real meat of the business that this meeting is only beginning.

With that, I would like to introduce Barbara Ringer. [Applause.]

TESTIMONY OF BARBARA RINGER, REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE

Ms. **Ringer**. Thank you very much, Bruce.

I really appreciate what you said, and I also appreciate everybody sticking with this long day to listen to my wrap-up remarks.

These are not formal. This is not a formal speech. I have tried to take some notes during the meeting and tried to write something up at lunch.

I am grateful for the opportunity to try to sum up, but I hope that we can have time—I think we will, actually—to have some discussion and see whether you agree with some of my conclusions. And maybe you have some more.

I am a very interested observer in this whole matter. I do consider this probably the most serious problem left in U.S. copyright right now. And I am generally encouraged with what I have heard today.

In meetings of this sort, I hear these same things over and over again. I know a lot of you have heard this subject discussed to the point of nausea. But what we do, and I think many of you are getting onto this, is that you listen for the nuances, you listen for the little shifts in emphasis, and then you try to judge the whole picture as best you can on the basis of these little changes and so forth. And I think there are some.

I would say on the whole that the interest in this subject is just as intense, just as high, as it was 1½ years ago, perhaps even more so. I think the attendance at this meeting shows that.

I think also the attentiveness with which people listened to the presentations shows that they were really trying to understand what was being said. That was very obvious.

I also think that the emotional tone, the rhetoric and so forth, has been muted somewhat. I think that the tone here was pragmatic and practical rather than oratorical.

And I think that is progress.

I think that it is clear that people now are much more familiar with this problem than they were a year and a half ago. To some

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people at Airlie, they were really encountering the copyright problem on videotaping for the first time. And I think that we are way past that point now.

I think people realize what the problem is, pretty much what its dimensions are, and to a considerable extent, its ramifications for the future.

There is no question in my mind that most of the people here are willing to sit down. I think there are a lot of people here who are anxious to sit down, and some of you are darn impatient to sit down and discuss the problem.

There is also no question in my mind on the basis of what I have heard today that the formation of an ad hoc committee is certainly worth the effort. I think that its mandate is still something that we have to discuss and that the chances of any kind of ultimate success are by no means certain. Maybe 50-50, maybe even less.

But I don't think that should in any way deter us from going forward with this proposal. I think that clearly, the chances of some sort of success, some kind of progress emerging from this enterprise, are greatly enhanced by the fact that Congress, through its subcommittees, will be monitoring and overseeing, to some extent, what is going on.

It does seem to me that having Congress and its representatives directly involved in this project doesn't insure success, but certainly makes the chances of it much greater.

It is something that a Government agency or an office like the Copyright Office can't provide.

This is a public factor, and it was lacking at Airlie and after Airlie. And I think that the interest that has been expressed by Chairman Kastenmeier and the ranking minority member, Railsback, and by the others who have spoken here in the congressional context and staff people and counsel indicate something to me.

And I think this is what I would interpret. Maybe they would differ from this, maybe you would.

But it seems to me not only to bespeak a concern, but to suggest that if there is some kind of constructive result of all this herculean effort, as it was called this morning, that it will receive some sort of imprimatur from Congress.

One thing that amazes international figures in copyright is the imaginative, constructive way that the congressional committees have used their jurisdiction in this field.

In other countries, they just pass laws and forget it. That's it.

In this area, there is, I think, an effort to try and go a good deal further. And I think we have this going for us here.

Moreover, even if, and I think they clearly do exist, the chances of an impasse are there, we have had them before on this subject.

And there is, of course, a new factor which hasn't been stressed today, but it needs to be mentioned: The fact that we do now have litigation ongoing and the history of technological developments and their impact on the copyright law in other areas would suggest once you have a case that is going forward lickety split in the courts, forget about anything else. You have just got to wait until the court decides.

Well, I don't think, as somebody just said, we can afford to wait. I think chances of success are impaired by the fact that we have got litigations and positions do get frozen and people tend to wait and see what the courts are going to say in the last analysis.

I don't look on this as a hopeless situation. I don't think this guarantees an impasse. Even if it did, I think it would be worth going forward.

But if an impasse is reached, and it is a possibility, my strong impression is that Congress will not shrug its shoulders and say, "OK, it is an impasse, don't worry about it."

I think they will take the lack of result as something very significant and will react to it seriously and will do something about it.

What happens is something for the future to say. But it does seem to me that the possibilities here are real. But regardless of what the overall prospects for success are, I think the endeavor is worthwhile.

Over the years, we have seen technological marvel after technological marvel. They obviously enhance access of the public user to copyrighted works. And at the same time, they break down the copyright owner's ability to control the market, the copyright market.

And in many cases, they bring on some kind of crisis. And that's what we are seeing here.

In almost every case that I can think of, action by the copyright owners to defend their rights didn't occur soon enough. By the time some crunch really occurred, the patterns and practices by users had become so entrenched, that they were too fixed to be changed in any material sense.

And what you have seen in three or four cases specifically are forms of compulsory licenses. Perhaps this is not the case here.

I think that perhaps the copyright owners have become sufficiently sophisticated about this process, which is pretty predictable, that they have acted soon enough.

I think there is a real opportunity here for imaginative, openminded, constructive resolution of an exploding problem and that there is an opportunity for copyright owners to come out of it whole, come out of it with their rights fairly intact and with their livelihood unimpaired.

I also agree with those who say that when I speak of copyright owners, it is a very, very broad group.

I think when we first went into this, we were thinking primarily of film and TV producers on the copyright side, and broadcasters of various sorts. But, of course, it isn't true. Every person who is involved in the legislative process is directly affected by this. It includes the writer and talent unions.

And as I said, at Airlie, I was very glad to see them come out and participate. I am very glad to see them here today.

I am also very, very happy to see a lot of other creative people represented here, individuals, authors, that are not part of a union, composers. A large range of music interest have been here today during this presentation, record producers, composers, performers, and so on and so forth in the music area and book publishers.

And I am also glad to see visual artists represented. I think their interest are more affected than people realize.

Now, I would like to mention something in passing. And without going into a lot of detail, it hasn't been referred to at all today.

I think there is a tendency, not to be preachy about it, but a tendency to think these things only happen in the United States. Of course, that is not true at all. And there have already been two im-

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portant international meetings on this subject—one in 1977 and one in 1978.

The last one was last September in Paris.

And let me just run down for you very generally, without going into any detail, the conclusions that came out of that.

I might say that the video tape technology is just hitting in Europe, but it is hitting. And the ramifications and the potentialities and dangers are all too apparent. I think they are much more apparent to the private sector people than they are to the Government people so far.

But the Government people are beginning to realize what is happening.

First of all, the subcommittee that met in September concluded there wasn't any need to amend any conventions; that the rights that they see as affected there are protected under the convention, including, I guess, the Rome Convention, although in some areas, that is a little hard to find.

But there is a very real need to alert legislators at the national level to what is happening and what the various considerations are.

And these subcommittees did agree to put out sort of guidelines, or at least checklists, of questions to governments, all the governments in the world, 160 or something, pointing out these problems and trying to give some flesh to the basic issues involved—the basic idea being that legislation is necessary if it doesn't exist now.

The first conclusion was that there is very little, if any, fair use in the commercial area, that the guy that was doing it for the oil rigs down in Louisiana doesn't have much argument when you get into the legal arena.

I think this would be something that practically everyone in the national copyright area would argue strenuously.

There was also an interesting and kind of startling conclusion of this group that here we are talking about video and in many ways, the audio market is being eroded just as much. And that you cannot, in the last analysis, draw a logical line between them.

And the conclusion of the subcommittee was that the same considerations perhaps were mutantous, mutantous changes applied to audio off-air taping as to video. And when you get into questions of soundtracks or sound channels on tape, you do find that the line breaks down.

And the conclusion which wasn't thrashed out but it was a firm conclusion made in principle, was that audio recordings should be included in the future considerations of this.

Now there was an effort structurally to divide home taping by individuals from educational, scholarly, archival copying. In the home taping area, the conclusion which was unanimous and wasn't really confuted was that there is only really one way to deal with this; that there really isn't any other way to deal with home taping except to put some kind of surcharge on the equipment, either the hardware or software or both.

I have not been happy with this conclusion over the years. I have felt in this country it could be extremely easy to get around such an arrangement and extremely hard to enforce.

But I have come to the conclusion myself they are right, there really isn't any other way to deal with the home taping problem.

And obviously, if you were going to do this, you would have to have legislation.

That is not what we are here to talk about. I guess it is certainly part of the picture. And if you are going to go forward in the educational area, you would have to take into account what people can do in their homes or not do in their homes.

In the educational area, this was all breaking new ground at this last September meeting. And what they came out with was really a checklist of questions that people who were at Airlie, or read the Airlie report and have been here today, would find very familiar.

The questions are recurring exactly in the same context in other countries.

Obviously, different governments, different television setups, and so forth, but the same questions arise. And I think that you would find those questions extremely interesting. And I would hope that the ad hoc committee that comes out of this will pay attention to this report.

The feeling was very strong that—and this, I think, was also unanimous—there should not be any compulsory licensing in this field. First of all, it would probably violate the conventions; maybe not the UCC, but the Bern Convention probably would not allow for compulsory licensing in this field.

There was also a very strong feeling which has been expressed here also that the compulsory license simply doesn't provide enough compensation. It is a pittance and a token, and it isn't any answer to compensating copyright owners for the use of their works.

But, and this is a big "but," and everybody agreed to this—if you are going to have voluntary systems, they have to be effective. You have to have networks or consortia, or whatever you want to call them, on both sides so you don't have this cascade of copyright owners and copyright users. You have to have some kind of central source to go through on both sides.

And everyone agrees with this.

Now, in Europe, it is much easier because they have centralized performing rights, societies, usually one that can be drawn upon. And this is already happening.

I think that we have to consider what we are going to do in this country. And I will leave you with the thought; it is a very important one.

And finally, the question of what does the disk do to all of this?

Well, the disk does something to it, I guess. But I think where I am coming out on the basis of the discussions there and here is that, sure, the disk is going to alter the situation and give the copyrighter that considerable control. But don't assume the off-air videotaping is going to go away.

The technology is pretty well advanced. It is going to improve. And I think there are people who are going to want to tape rather than buy a disk, even if the disks costs half of the cost of the tape. I think you are going to have that. I think that does not make what we are doing here at all futile. Quite the contrary.

For those of you who are interested in this, and I hope you all are, this was only a subcommittee. It came up at the full committee meeting, which was in two parts last month.

The Germans and the Austrians, who are pretty far along with these surcharge arrangements, both were concerned. Neither one of them were represented at the subcommittee.

So the whole discussion was put off until October so that the final report that will be sent to governments will not emerge until this fall. And there is still an opportunity for input into this, and it is important.

Don't assume that these things are purely within our borders by any stretch of the imagination.

Now, as to the ad hoc committee. The membership is still to be worked out and it is excruciating to try to do this sort of thing. I have said, and I mean it, there are a wide range of interests affected.

But some interests, especially where there are three or four organizations that are different, but still a kind of a community of interest, are going to have to have surrogates. Somebody has said that the best committee consists of three people, of whom one is late and another is sick, which is true.

We are obviously going to have a few more than that.

But nevertheless, please recognize that the potential success of a committee like this is to some extent, at least, in inverse ratio to its size. The larger it is, the less chance that it will ever come to anything.

We have seen this time after time. And I do remind you of our various photocopying adventures. But it is important that, either directly or through surrogates, every interest that is affected is represented somehow, and that they are then not ignored or neglected.

This is not easy. And I do implore your understanding and cooperation in trying to set this up.

I think that one answer to this would be to set up some kind of reporting apparatus formally so that within a group, you would have a clear assurance of getting the message as it is coming down contemporaneously. And I think that can be done.

Now, what is the mandate of the ad hoc committee? Among others, Jim Burros spoke of dealing with the problem in toto. I think he used that phrase twice.

And I think I know what he meant. But let me test it a little bit. Do you want to talk about audio reporting? Well, the subcommittee felt that it was part of the picture and I am inclined to agree in that context. But I am not sure that that would serve your purposes here.

It would introduce an entirely separate, discrete set of problems, set of personnel, and so forth.

My own inclination, and I raise this for discussion, would be to leave it with vidoetaping and try to deal with the questions of soundtracks and sound channels as a part of that.

Do you want to deal with home taping as distinguished from taping in educational institutions and so forth? Do you want to deal with commercial taping? All these impinge.

The borderland of these problems, the borderlands all overlap, obviously. But I think it would get you into areas that are probably better not gotten into in terms of trying to accomplish something.

I would be inclined to leave it at videotaping and the educational contexts.

I think what Jim was saying and others seem to agree with him, was that it should go beyond fair use, Fair use, generally, or in certain contexts. That solving the fair use problem is maybe the least of the job that has to be done.

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I agree with those speakers who seem to be saying there was a lot of support for this if you try to reduce, that by all means, develop clearcut, definite guidelines, if you can, on fair use, that apply not only to teachers and media people in schools, but to librarians and archives, and maybe even scholars in certain contexts, so that we can know where the line is and where they can, without uncertainty or a feeling that they were betraying their patrons or the copyright owners on one side or the other, do or don't do something.

But don't stop there.

And I guess that is the basic question. This is not easy. In fact, there is hardly anything harder. But there does seem to me a sentiment here which I share, that this ad hoc group and the people that are on it and the people that they represent should somehow work jointly, not separately, but jointly, toward voluntary clearance mechanisms.

I come back to the compulsory license. I agree very strongly that that is to be avoided at all costs. But I have seen, I have made that kind of statement about things in the past. And I have seen the compulsory licenses come. They become almost inevitable if you can't solve the problem some other way voluntarily in time.

You get to the point where the only choice is a compulsory license and no rights at all.

I think we are not yet at that point, or nowhere near it, really. I think we have time to develop voluntary licensing arrangements. And I would strongly urge you not to wait much longer.

I do feel that the educational community must participate in this from the start, or it won't work.

I do feel that if there is pretty strong broad agreement as to what their use is, and if the educational community is brought into an endeavor to try to set up clearance mechanisms from the start, there is a reasonably good chance that this would work.

I think if you don't solve the fair use problem, or if you don't bring the educational community into the mechanism of the clearinghouse, or whatever you want to call it, then it won't work.

I think what we have seen in other areas as to know very well, you will find educators and others saying, we will not participate in it actively. You are not going to throw money at the clearinghouse when we are not sure whether we are paying for something that is fair use.

The two go hand in hand. And you have got to somehow coordinate them. This is really terribly hard. It is hard within the various groups on the same side, and it is even harder when you try to bring it all together. But I do think it has to be done, at least the effort has to be made.

I think I agree with the point that has been made that you should seek fast and practical solutions in the light of those facts. I wouldn't get bogged down on developing a lot of statistics.

I think we are past that point. But as long as the discussions are couched in terms of practical realities, things that are happening today, that you can actually observe rather than fears for the future, I think it does avoid a great deal of rhetoric and confrontation.

The tone of today's meeting does give me a great deal of hope. And as everyone else has been grateful, I will be grateful. I am grateful to the Judiciary Committee and its chairman and ranking minority member and its counsel.

I think that this meeting has carried us further, and I am sincerely hopeful it has gotten copyright around another dangerous corner.

Thank you very much.

[Applause.]

Mr. LEHMAN. We had earlier said that with respect to a discussion period, we would ask people if they wanted to have discussion or say something to sort of write a couple of lines on a piece of paper and turn them in to Miss Marcus.

And as far as I know, she hasn't received anything. So I don't know what that means.

It means we are getting awfully late and many people would like to go home.

VOICE. May I ask a question? Earlier, mention was made of a 2-week period during which written comments on this could be made.

Would you elaborate?

Mr. LEHMAN. Yes. Anyone who would like to submit anything to go into the official record of this, which will be printed as a hearing of the subcommittee, may do so. And they should address those comments to the subcommittee and its chairman, Robert W. Kastenmeier, 2137 Rayburn Building, Washington, D.C. 20515, to the attention of Bruce Lehman. And I will make sure that it gets put in the record.

And we hope to try to send these things off to the printer 2 weeks from today so that we can, within a month or so, have this written document actually printed up and available to everybody.

I think since there will probably be a lot of interest in it, we will try to have more than our usual 500 copies printed, so that it can be widely made available, as we did with the legislative reports and certain other documents with the 1976 law.

Just as the final order of business, I would like to turn the floor over to our minority counsel for about 30 seconds of concluding remarks.

And I am personally very grateful that you came out today. I think it will be a great help to the subcommittee, and certainly, it is a help to us as staff in attempting to inform the subcommittee of the issues, trying to redirect, if possible, some legislative pressures they would otherwise have directed toward them if meetings like this didn't take place.

Thank you very much for coming.

[Applause.]

Mr. MOONEY. Thank you, Bruce. I am going to share my 30 seconds with Ivan.

I want to thank all of you very much, and particularly the speakers. I have never been to a conference where things went so smoothly and the speakers stayed within their timeframe so very, very accurately.

And never at any time did I even think about chasing for a gong or anything else.

On behalf of all of us, I would like to thank especially Bruce and Barbara and Ivan and Jon Baumgarten, Audrey Marcus, whom I think most of you have spoken with at one time or another, and Rob Kurz, for all their efforts.

Bringing a distinguished group of this size together, as you might suspect, is certainly not easy. And thank you very much. And here is Ivan.

[Applause.]

Mr. **Bender**. I will do it quite as rapidly and really appreciate all of you giving up of your time, and in many cases, incurring travel expenses to come out here. I think it is worthwhile.

And I really do look forward to working with the negotiating committee once it is formed. And you will be hearing from us.

And in echoing what Tom and others have said, Bruce, I want to pay particular tribute to staff, Barbara Ringer's secretarial group, Linda Cox and her people, for doing a magnificent job and pulling all this together. It wasn't easy, but it is worthwhile.

And I hope that all of you feel your attendance was worthwhile.

Thank you very much.

[Whereupon, at 4:10 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

1. List of Hearing and Conference invitees.
2. List of Negotiating Committee Members.

APPENDIX II

Legal Materials:

1. *Encyclopedia Britannica Educational Corporation* v. *US Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978)*
2. *Northern Kentucky Law Review*, Roger D. Billings Jr. "Off-the-Air Video Recording, Face-to-Face Teaching, and the 1976 Copyright Act.

APPENDIX III

Additional Statements:

1. Charles W. Adams, Supervisor, Media Services Phoenix Union High School District, Phoenix Arizonia, "Off-Air Taping and Public Education Position Paper."
2. Association of American Publishers, Inc. "Preliminary Comments on Off-Air Videotaping."
3. James Bouras, Motion Picture Association.
4. Martin Burke, Associate Professor of Speech Communication and Theatre, Prince George's Community College.
5. David J. Carnahan, Associate Dean of Library Services, the Evergreen State College, Olympia Washington
6. Consortium of University Film Centers Executive Office, Charles Hunger, President; Ruth Raines, Executive Director; Robert L. Allen, Board of Directors.
7. Jack L. Copeland, President, Training Media Distributors Association, Los Angeles Calif.
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APPENDIX III—Continued

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APPENDIX I

1. CONFERENCE ON OFF-AIR TAPING FOR EDUCATIONAL USES SPONSORED BY SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE AND COPYRIGHT OFFICE, LIBRARY OF CONGRESS, MARCH 2, 1979

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APPENDIX II, LEGAL MATERIALS

1. UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CIV-77-560

ENCYCLOPAEDIA BRITANNICA EDUCATIONAL CORPORATION, LEARNING CORPORATION OF AMERICA AND TIME-LIFE FILMS, INC., PLAINTIFFS,

v.

C.N. CROOKS, JOSEPH S. PLESUR, WILLIAM MOORMAN, GEORGE MUELLER, RICHARD E. FORRESTEL, RICHARD M. PFEIFFER. FREDERIC SIEVENPIPER, JOHN STOVALL, THEODORE E. ERTEL, ALVIN J. KRAEBEL AND BOARD OF COOPERATIVE EDUCATIONAL SERVICES, FIRST SUPERVISORY DISTRICT, ERIE COUNTY, DEFENDANTS.

APPEARANCES: RAICHLE BANNING, WEISS & HALPERN (R. WILLIAM STEPHENS, Esq., of Counsel) Buffalo, New York, for Plaintiffs. ELLIS, KUSTELL & MULLENHOFF (CARL B. KUSTELL, Esq., of Counsel) Buffalo, New York, for Defendants.

The plaintiffs are three corporations engaged in the business of producing, acquiring, and licensing educational motion picture films. On October 19, 1977, the plaintiffs filed this copyright infringement suit against the Board of Cooperative Educational Services of Erie County [BOCES], a nonprofit corporation organized under the Education Law to provide educational services to the public schools in Erie County.

The complaint alleges that BOCES has videotaped a number of their copyrighted films without their permission and distributed the copies to the school districts for delayed viewing by the students. The plaintiffs demand that the defendants be enjoined from videotaping copyrighted films and they seek both actual and statutory damages for past infringement. They also request an award of costs and fees, and the surrender or destruction of all infringing copies of the films.

At the time of filing the complaint, the plaintiffs moved for a temporary restraining order to prevent the destruction of the existing videotapes and records pertaining to the tapes in BOCES' possession pending a final decision in the case, and also to obtain accelerated discovery privileges. This motion was granted by the court, upon the plaintiffs' agreement to post a $10,000 bond to idemnify the defendants against possible loss. Both parties proceeded to engage in preliminary discovery.

The case is now before the court on the plaintiffs' motion for a preliminary injunction. The plaintiffs seek to temporarily enjoin the defendants from videotaping plaintiffs' copyrighted motion pictures from television broadcasts, recopying the videotapes, distributing these tapes to the school districts, displaying the copies in classrooms, and transmitting the videotaped films to the schools over closed-circuit television cables. A hearing on the motion was held on December 27, 1977, at which the attorneys agreed not to call witnesses in connection with the motion but to rely on filed affidavits, exhibits, memoranda of law, depositions, and oral argument.

All three of the plaintiffs are engaged in the business of producing, acquiring, and licensing educational audiovisual materials. Although the percentage varies among the three, all derive substantial income from the sale and licensing of copyrighted educational motion pictures, both to television networks and to educational institutions. Each of the plaintiffs owns copyrights to some of the films on which this infringement suit is based.

Since 1969, plaintiff Learning Corporation of America [LCA] has been entering into licensing agreements with BOCES for the purchase of 16-millimeter prints of educational films. In 1975, its revenues from BOCES reached a peak of $12,676.25, but declined to $1,703.75 by 1977. Some of the films on which LCA's infringement claim is based have been the subject of licensing agreements. Neither of the other two plaintiffs has at any time entered into licensing agreements with BOCES.

BOCES was created under § 1958 of the New York Education Law for the purpose of providing educational services and specialized instruction on a cooperative basis to the school districts within its geographic district The Erie County BOCES services twenty-one school districts, including over one hundred separate schools. The focus of this lawsuit is one of BOCES services, its practice of videotaping educational programs from television broadcasts and distributing the tapes to the schools for delayed viewing in the classrooms.

BOCES admits that it has been videotaping television programs of educational value since 1966. Since 1968, it has been openly distributing catalogs to the teachers within the twenty-one school districts which describe the available programs and provide ordering instructions. Each of the educational films involved in this lawsuit has been listed in one of BOCES' catalogs as available to the schools.

When a program of educational value is broadcast on television, BOCES makes a master videotape of the entire film. The vast majority of films it tapes are broadcast by the local public broadcasting channel, WNED-17, but some also are broadcast by commercial stations. The catalog describes the programs and provides that if a teacher wants to order a copy, the school district must supply BOCES with sufficient blank videotape and allow two weeks for processing.

When a school files a written request for a videotape, BOCES copies the master onto the blank tape and delivers the copy to the requesting school. BOCES holds the master in its videotape library for varying periods of time before erasure. The copies are viewed by the students in the classroom, and in most instances then are returned to BOCES for erasure and reuse in videotaping other programs. However, BOCES does not require the schools to return the tapes. A few of the school districts keep the copies for their own videotape libraries. BOCES also does not monitor the use of the tapes by the schools, but presumes they are used solely for educational purposes. Copies are distributed only to the schools within its twenty-one school districts and then only upon written request. Copies are supplied to the schools at cost, and no admission is charged to the students.

With the exception of the 1974–75 school year, BOCES has records of the number of copies made of each particular television program. These records show that the volume of copying is substantial. During the 1976–77 school year, for instance, BOCES duplicated approximately ten thousand videotapes. BOCES has not kept records of the number of times a copy has been displayed in the classroom or the ultimate dsiposition of the tapes.

According to the defendants' affidavits, this program is a significant component of the instructional support services provided by BOCES, and is relied upon by the teachers in planning their school curricula. Since many of the programs are televised when classes are not in session or at times that do not coincide with coverage of the subject in a particular course of study, it is claimed that the students cannot view these programs unless videotapes are available. In order to provide this service, BOCES has invested a considerable amount of money in videotape equipment, which has an estimated replacement cost of one-half million dollars. BOCES has between five and eight full-time employees working to provide the service. The defendants claim that if the program is discontinued, public education would be greatly disrupted.

All three of the plaintiffs have been aware that educational institutions were videotaping their copyrighted television programs for some time. Time-Life has had knowledge of this practice since at least 1972, and LCA and Encyclopaedia Britannica have known since 1973. The Association of Media Producers, a trade organization to which all three of the plaintiffs belong, has been negotiating with the National School Board Association and other representatives of educational institutions in an attempt to define what constitutes fair use in the area of videotaping educational programs. These negotiations are still in progress, and no compromise has yet been reached.

BOCES' practices came to LCA's attention approximately in December 1976, when it received a copy of the BOCES videotape catalog. The catalog was thereafter supplied to the other two plaintiffs, and this action was commenced.

The plaintiffs' theory of infringement is straightforward. As the copyright owners of the films in question, they claim that they have the exclusive rights under federal copyright law to copy and perform the films. These exclusive rights were infringed by BOCES each time it videotaped one of the films off the air without permission and again each time it distributed a copy of a tape to a requesting school for performance in the classroom. They argue that in copyright infringement actions, irreparable harm is presumed once a prima facie case of infringement is established, and that therefore they are entitled to preliminary injunctive relief.

BOCES admits that it has videotaped the plaintiff's copyrighted films without paying license fees or obtaining permission, but opposes the motion on three grounds. First, it raises the fair use doctrine as a defense and argues that noncommercial videotaping of television programs off the air for purposes of delayed viewing in the classroom is not a copyright infringement. Second, BOCES argues that the plaintiffs are barred by the doctrines of laches and estoppel from obtaining preliminary relief. Finally, it contends that any presumption of irreparable harm is rebutted by the existence of a clear measure of damages provided by the plaintiff's licensing agreements, coupled with BOCES' records of the number of copies it has produced. In the post-argument papers, BOCES makes the additional claim that most of the television programs videotaped by BOCES were purchased by the local educational channel, WNED–TV, with state funds, and that these appropriations were made to WNED for the purpose of providing instructional broadcasts for the public schools at no cost to the schools. BOCES argues that the plaintiffs are seeking to force the state to pay twice for the use of their films and that the appropriations would not have been made if the instructional programs could not be utilized by the schools through videotaping. Although BOCES voluntarily stopped distributing tapes to the schools when the suit was commenced, it claims that this has caused a substantial hardship to the educational institutions served and wishes to reinstate its program.

As a general rule, a motion for preliminary relief should be granted only upon a clear showing of either probable success on the merits and possible irreparable injury or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping in the plaintiff's favor. *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F. 2d 247, 250 (2d Cir. 1973). In copyright infringement cases, however, the standard is less rigorous. It is well established that "[a] copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises* v. *Warner Brothers Records*, 389 F. 2d 903, 905 (2d Cir. 1968). Because injury normally can be presumed, the plaintiff in a copyright case is entitled to a preliminary injunction even without a detailed showing of irreparable harm if the plaintiff demonstrates probable success on the merits or a prima facie case of infringement. *Wainwright Securities, Inc.* v. *Wall Street Transcript Corp.*, 588 F. 2d 91, 94 (2d Cir. 1977), cert denied, 46 U.S.L.W. 3427 (Jan. 10, 1978); see also *Robert Stigwood Group Ltd.* v. *Sperber*, 457 F. 2d 50, 55 (2d Cir. 1972); *Uneeda Doll Co.* v. *Goldfarb, Novelty Co.*, 373 F. 2d 851, 852 n.1 (2d Cir. 1967); *Rushton* v. *Vitale*, 218 F. 2d 434. 436 (2d Cir. 1955) (Clark, J.).

I. Turning first to the question of irreparable injury, the plaintiffs claim that BOCES' videotaping is depriving them of licensing fees and is irreparably impairing their market for educational films. Theu point out that BOCES could readily avoid any disruption in its educational services pending a final decision in this case by entering into licensing agreements with the plaintiffs for the copying and performance of their copyrighted films. They contend that these licenses would provide a ready measure of damages, payable out of the $10,000 bond should BOCES ultimately prevail.

BOCES contends that the presumption of irreparable harm in copyright infringement cases can be rebutted by showing that monetary damages would provide full compensation for any infringement. They claim that the plaintiffs' licensing agreements, taken in conjunction with BOCES' records of the number of videotapes being made, provide a clear measure of damages, and that therefore preliminary relief is inappropriate.

I find that the plaintiffs' showing of irreparable harm is sufficiently detailed to meet the standard enunciated in Wainwright. The plaintiffs allege that BOCES' practices threaten to destroy or substantially impair their market for educational films. This claim, if true, encompasses injury beyond lost licensing fees, which cannot readily be reduced to monetary terms. Moreover, BOCES does not keep records of the number of times each film is displayed in the schools, and it does not guarantee return of the videotapes. Absent such records and guarantees, the licensing agreements would not provide a clear measure of damages caused by distributing copies of the films to the schools.

II. The question of probable success on the merits poses a more troublesome issue. Educational institutions have been videotaping television broadcasts for strictly educational purposes for some time. The legality of such copying has never been determined, either by the courts [1] or by the legislature. The problem of accommodating the competing interests of both educators and film producers raises major policy questions which the legislature is better equipped to resolve. However, Congress has not as yet provided a legislative solution to the problem but has left the issue to the courts.[2]

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[1] *Walt Disney Productions* v. *Alaska Television Network*, 310 F.Supp. 1073 (W.D. Wash. 1969), is not in point. The defendant in that case was engaged in commercial videotaping for profit and no quetion of fair use was raised.

[2] The Copyright Revision Act of 1976, Act of Oct. 19, 1976, Public Law 94–553, 90 Stat 2541, codified in 17 U.S.C. §§ 101–810, makes extensive changes in the copyright law, many of which were designed to address issues raised by rapidly changing technology. Several isolated problems regarding the use of copyrighted works by educators are resolved by the new legislation. See e.g., 17 U.S.C. § 110(1) (allowing teachers engaged in "face-to-face teaching activities" to use copyrighted works under certain well-defined circumstances); id. § 504(c)(2) (exempting teachers acting in good faith and with the reasonable belief that their use was fair from statutory liability for infringement). For a more detailed discussion of these provisions, see Comment, "Education and the Copyright Law," 46 Ford. L. Rev. 91 (1977). The Act also mentions videotaping in several limited contexts. See, e.g., id. § 108(f)(3) (allowing libraries to videotape newscasts for distribution to educators and researchers); id. § 118(d)(3) (allowing nonprofit institutions to videotape certain noncommercial television broadcasts for use in face-to-face-teaching activities within 7 days of the broadcast).

However, the Act does not address the question of whether off-the-air videotaping of copyrighted motion pictures for classroom use is an infringement. The legislative history clearly demonstrates Congress' intent to leave the problem to the courts pending further negotiations between the film industry and educators aimed at developing guidelines to protect the interests of both groups. The House Report, urging the interest groups to continue their discussions, states:

"The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point."

H.R. Rept. No. 94–1476, 94th Congress, 2d session 71–72 (1976), reprinted in [1976] USCC & AN 5659, 5685.

However, the Act does not address the question of whether off-the-air videotaping of copyrighted motion pictures for classroom use is an infringement. The legislative history clearly demonstrates Congress' intent to leave the problem to the courts pending further negotiations between the film industry and educators aimed at developing guidelines to protect the interests of both groups. The House Report, urging the interest groups to continue their discussions, states:

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I assume for purposes of this motion that the plaintiffs are the copyright owners of the films providing the basis for this lawsuit,[3] and that BOCES has videotaped and distributed copies of these films without the plaintiffs' permission, either by license agreements or otherwise.[4] This squarely raises the issue of infringement.

Section 1 of the Copyright Act of 1909 declares that a copyright owner shall have the exclusive rights to copy the copyrighted work and to exhibit or perform it publicly. Infringement of these rights entitles the copyright owner to injunctive and monetary relief.[5] Substantially the same general provisions were reenacted by Congress in the Copyright Revision Act of 1976,[6] which applies to any alleged infringements occurring on or after January 1, 1978. Act of October 19, 1976, Public Law 94–553, Transitional and Supplementary Provisions, § 102, 90 Stat. 2598.

Viewed solely in reference to the copyright law, BOCES' videotaping activities would seem to constitute a blatant violation of the plaintiffs' exclusive rights to copy and perform their films. However, the statutory language is qualified by the judicial doctrine of "fair use." Although the doctrine is a defense to claims of copyright infringement, *Nimmer on Copyright* § 145, its application nevertheless must be considered in determining the existence of a prima facie case for purposes of preliminary relief. *Wainwright*, supra at 94.

The fair use doctrine was developed by the courts as a means of balancing the public's interest in the development of arts, science, and history with the copyright owner's exclusive rights. It has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *." *Rosemont Enterprises* v. *Random House*, 366 F. 2d 303, 306 (2d Cir. 1966), cert. denied, 385 U.S. 1009 (1967), quoting Ball, "Copyright and Literary Property" 260 (1944).

Although the line between infringement and fair use of copyrighted material depends on the facts of each case, *Meeropol* v. *Nizer*, 569 F. 2d 1061, 1068 (2d Cir. 1977), cert. denied, 46 U.S.L.W. 3427 (Jan. 10, 1978), the courts have given primary consideration to four factors in determining whether a given use is fair. Id. Congress has codified these four factors in § 107 of the Copyright Revision

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[3] When the complaint was filed, the case concerned nineteen copyright films owned by the plaintiffs. Since that time, preliminary discovery has uncovered additional films owned by the plaintiffs and copied by the defendant. At this stage, BOCES is not contesting the plaintiffs' ownership of the copyrights. As additional films are added to the complaint, however, BOCES is entitled to investigate plaintiffs' ownership of particular films and object where appropriate.

[4] As to LCA; some question of permission may exist. Some of the films providing the basis of this lawsuit were at one time the subject of licensing agreements between LCA and BOCES. In addition, as pointed out in the defendants' Brief in Opposition to Motion for Preliminary Injunction at 36–37, LCA agreed to allow videotaping off the air by schools which subscribed to educational television for seven-day periods after the program was broadcast, and some question arises as to whether BOCES' practices fall within this express permission. These issues should be resolved at trial.

[5] Derived from Act of Mar. 4, 1909, ch. 320 §§ 1, 25, 64, 35 Stat. 1075, 1081 , 1088, and previously codified in 17 U.S.C. §§ 1(a), 1(d), 101.

[6] Now codified in 17 U.S.C. §§ 106, 502–505.

Act of 1976. Section 107 is intended to restate and not to change existing doctrine of fair use.[7] It reads in part as follows:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

Despite this guidance the application of the fair use doctrine has been characterized as "the most troublesome in the whole law of copyright." *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F. 2d 661, 662 (2d Cir. 1939).

BOCES argues that videotaping educational programs off the air for delayed viewing by students constitutes a fair use of plaintiffs' films and that therefore the plaintiffs have not shown probable success on the merits in their application for preliminary relief. In support of its position, BOCES relies on *Williams & Wilkins Co.* v. *United States,* 487 F. 2d 1345 (Ct. Cl. 1973), aff'd by an equally divided court, 420 U.S. 376 (1975), the leading case in the application of the doctrine to noncommercial copying. Due to the difficulty and complexity of the issues raised by BOCES' defense, a detailed examination of *Williams & Wilkins* is in order.

In *Williams & Wilkins*, a major publisher of medical journals sued a federal medical research organization and its library for copyright infringement of four of its journals. The claim was based on the defendants' admitted practice of of photocopying articles from medical journals at the the request of medical researchers and practitioners who used the articles for professional purposes. The defendants also supplied copies of journal articles to other libraries and research institutions as part of an interlibrary loan program. The copying for individual requesters was massive in scope, involving ninety-three thousand articles in the year 1970 alone and requiring four full time employees to fill the requests. The copying for the inter-library loan program also was substantial. However, the defendants normally restricted copying on individual requests to a single copy of a single article and to articles of less than fifty pages. Requests from other institutions were filled in most cases only if the article was at least five years old or not published in one of approximately one hundred widely available medical journals. An excessive number of requests from a given individual or institution would not be honored. In all cases, the requests were for professional, nonprofit purposes, but no monitoring took place of the use to which the copies were put, and copies were not returned to the library.

After an extensive trial, the trial judge found that the plaintiff's copyrights had been infringed. A sharply divided panel of the Court of Claims reversed, and an equally divided Supreme Court affirmed.

Judge Davis, writing for the four-judge majority on the Court of Claims, applied the four factors described above, and concluded that the defendants' copying was a fair use. The court's conclusion was based on three primary considerations:

"First, plaintiff has not in our view shown, and there is inadequate reason to believe, that it is being or will be harmed substantially by these specific practices of NIH and NLM; second, we are convinced that medicine and medical research will be injured by holding these particular practices to be an infringment; and, third, since the problem of accommodating the interests of science with those of the publishers (and authors) calls fundamentally for legislative solution or guidance, which has not yet been given, we should not, during the period before congressional action is forthcoming, place such a risk of harm upon science and medicine."

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[7] H.R. Rept. No. 94–1476, supra n.2, at 65–66. With the exception of taping newscasts under § 108, the Copyright Revision Act does not extend the right to videotape copyrighted films beyond that permitted by existing seven-day taping rights. The plaintiffs argue that this demonstrates Congress' intent not to exempt educational uses of copyrighted films from the class of infringing uses. The legislative history, however, makes clear that the statutory exemptions were intended to supplement rather than supersede the doctrine of fair use. Id. at 36, 72; H.R. Rept. No. 90–83, 94th Congress, 1st session, 37 (1967). Therefore, one cannot infer that a use is prohibited merely because it was not exempted by the statute.

The plaintiffs also quote several passages from the legislative history which appear to support their argument that BOCES' activities cannot be considered a fair use under any circumstances. H.R. Rept. No. 94–1476, supra n.2, at 72–73; S. Rept. No. 94–473, 94th Congress, 2d session 65–66 (1976). The limited scope of the fair use guidelines adopted for classroom reproduction of books, periodicals, and music also support the plaintiffs' position. See H.R. Rept. No. 94–1475, supra n.2, at 67–71. On the other hand, Congress carefully disclaimed any intent to influence the present judicial doctrine of fair use as it relates to off-the-air taping for noncommercial classroom use, and made it clear that it was leaving open the question of the legality of such a use. Id. at 72. In light of this background, these arguments of the plaintiffs are inconclusive.

Id. at 1354.[8]

The analysis used by the Court of Claims in *Williams & Wilkins* is instructive in comparing the two cases and in deciding the issues presented here. The purpose and character of the use, which is the first factor considered by the courts in determining whether a given use is fair, is similar in both cases. Both sets of defendants have been providing services on a strictly noncommercial basis to a limited class of requesters for the purpose of promoting two traditionally favored areas of endeavor: science and education. Although the plaintiffs argue that a distinction should be drawn between the two uses because scientific research is more creative than education, there is no support for this distinction in the case law. As to the first factor, the parallels between the two cases are strong.

But as to the factors of the substantiality of the copying and the effect of the copying on the copyright owner's market, the two cases are distinguishable. In *Williams & Williams*, the requests normally were limited to single articles of fifty pages or less. In this case, the entire copyrighted film is being reproduced. Although the medical library did copy entire articles, each of which could be considered a discreet whole, there is nevertheless a significant difference between carrying an article out of a medical journal and reproducing an entire copyrighted work. In the latter case, the potential impact on the coypright owner's market is much greater because the reproduction is interchangeable with the original. The substantiality and extent of BOCES' copying clearly exceeds that of the medical libraries.

As to the impact on the copyright owner's market, the court must assume for purposes of this motion that BOCES' practices have had or will have a substantial effect on the plaintiffs. In *William & Wilkins*, in contrast, the court found the effect on the market to be minimal. Id. at 1357–59. This difference is economic impact between the two cases arises out of their different procedural postures. The *Williams & Wilkins* decision followed a full trial on the merits. After the plaintiff had an opportunity to demonstrate the effect of the photocopying on the market for medical journals, the court concluded that it had failed to show that it would be substantially harmed by the defendants' practices. Here, in contrast, the case arises on the plaintiff's motion for preliminary relief. The question of the effect of BOCES' videotaping on the plaintiffs' market for educational films has not yet been tried. Although BOCES has made a noteworthy attempt to show through premilinary discovery that the plaintiffs have not suffered any economic loss or impairment of their market,[9] the plaintiffs' affidavits contain allegations to the contrary.[10] These allegations raise substantial questions of fact, which can be decided only after a full trial record has been developed. Since the burden of establishing fair use is on the defendant and since the plaintiff in a copyright case is presumed to suffer irreparable injury, the court must assume for purposes of this motion that the plaintiffs are capable of proving their allegations.[11]

A final distinguishing factor between this case and *Williams & Wilkins* is BOCES' ability to avoid disruption of classroom services by entering into licensing agreements with the plaintiffs pending resolution of this case. One of the three considerations cited as controlling by the court in *Williams & Wilkins* was the injury to medical research that would result if the court found copyright infringement. Id. at 1360. Here, any injury can be avoided pending a final decision, and the plaintiffs' bond provides a ready source of recovery should BOCES ultimately prevail.

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[8] Congress responded to the court's call for a legislative solution in § 108 of the Copyright Revision Act, which authorizes the type of photocopying engaged in by the defendants. In enacting § 108, Congress stated that it did not intend to "take away any rights existing under the fair use doctrine." H.R. Rept. No. 94–1476, supra n.2, at 74. The court's analysis in *Williams & Wilkins* therefore remains valid today as to questions left open by the new Act.

[9] See Supplemental Memorandum in Opposition to Plaintiffs' Request for a Preliminary Injunction at 2, and affidavits of Carl B. Kustell dated December 16, 1977 and December 23, 1977.

[10] Affidavits of Ivan R. Bender, dated September 28, 1977; David M. Davidsen, dated September 1, 1977; Richard W. Schilling, dated October 5, 1977; John J. Urtis, dated September 30, 1977.

[11] This is not to say that BOCES, like the defendants in *Williams & Wilkins*, will not be able to prove the absence of economic harm at trial, which would require a reassessment of the fair use defense. For purposes of determining whether the plaintiffs have demonstrated probable success on the merits, however, the issue of economic loss must be found in favor of the plaintiffs.

The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale. BOCES had acquired videotape equipment worth one-half million dollars, uses five to eight full-time personnel to carry out its program, and makes as many as ten thousand tapes per year. For the last twelve years, these tapes have been distributed throughout Erie County to over one hundred separate schools.

Considering all of these factors, I find that the plaintiffs have established a prima facie case entitling them to preliminary relief. As BOCES points out, the applicability of the defense of fair use raises numerous questions of fact which cannot be resolved without a full trial on the merits. At this stage in the proceedings, I find that the substantiality of the copying and the possible impact on the market for education films tip the balance in favor of the plaintiffs, outweighing BOCES' noncommercial, educational purpose in copying the films.

In its post-argument papers, BOCES raises the additional claim that most of the television programs which it videotaped were purchased by WNED-TV with state funds, and that these appropriations were made to WNED for the purpose of providing instructional broadcasts for the public schools at no cost to the schools. BOCES argues that the plaintiffs are seeking to force the state to pay twice for the use of their films and that the appropriations would not have been made if the instructional programs could not be utilized by the schools through videotaping. At this time, the record does not contain sufficient information pertaining to this claim to defeat the plaintiffs' application for preliminary relief. This possible defense should be developed at trial.

III. The final point to be addressed is BOCES' contention that the plaintiffs' laches in bringing this motion bars their claim for preliminary relief.

Although the plaintiffs may have been aware for some time of the practice of some educational institutions of videotaping their copyrighted films, on the present record it appears that the plaintiffs had no knowledge of BOCES' practices until December of 1976 and therefore could not have sued BOCES until that time. Their delay in raising the infringement question in the courts, caused at least in part by their attempts to reach an out-of-court compromise solution to a difficult and complex problem, should be commended rather than condemned.

As to the ten-month delay between the time that the plaintiffs received BOCES' catalogs and the time that they filed a complaint against BOCES, I recognize that the organization and planning of a lawsuit involving multiple plaintiffs and substantial legal claims require time. On the present record, I am not willing to find that the ten-month delay was so excessive as to preclude preliminary relief.

The cases cited by the defendant are readily distinguishable from this case because they involved substantial questions of fact as to whether the defendant had in fact copied the plaintiff's copyrighted material. *Slifka* v. *Citation Fabrics Corp.*, 329 F. Supp. 1392 (S.D.N.Y. 1971); *Gianni Cereda Fabrics, Inc.* v. *Bazaar Fabrics, Inc.*, 335 F. Supp. 278 (S.D.N.Y. 1971), *Klauber Brothers Inc.* v. *Lady Marlene Brassiere Corp.*, 285 F. Supp. 806 (S.D.N.Y. 1968). These disputes decreased the likelihood that the plaintiffs would succeed on the merits, rendering preliminary relief less appropriate than in cases such as this where the copying is admitted.

IV. The plaintiffs have established their entitlement to preliminary relief. Accordingly, I direct that BOCES be enjoined from videotaping the plaintiffs' educational films or programs off the public airwaves. If this order unduly disrupts educational plans, BOCES can obtain licenses from the plaintiffs for use of the films. As to films which have already been videotaped and are incorporated into the curricula of the BOCES' school districts, however, I find that the public interest would be served if BOCES is allowed to continue distributing such tapes to the schools. The interests of the plaintiffs will be adequately protected if BOCES, in cooperation with the school districts, implements a plan to monitor the use of the tapes in the schools and to require their return and erasure within a specified time period.

The parties are directed to meet with the court on March 3, 1978 at 9:00 a.m. to frame an order complying with this decision.

So ordered.

John T. Curtin,
U.S. District Judge.

Dated: February 27, 1978.

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OFF-THE-AIR VIDEORECORDING, FACE-TO-FACE TEACHING, AND THE 1976 COPYRIGHT ACT

Roger D. Billings, Jr.*

I. Introduction

With the advent of new technology, copyright owners have been worried that schools and universities have gained access to audiovisual materials without payment or clearance. A recent incident justifies their concern. The Salt Lake City District School taped ten Walt Disney motion pictures off-the-air without payment or clearance. They kept the tapes in their library and allowed them to be aired publicly over their school television system. After Walt Disney Productions put them on formal notice, the school district agreed to stop any activities which would infringe Disney copyrights. They agreed to erase any tapes containing the copyrighted works and not to tape Disney's copyrighted motion pictures in the future.[1]

The problem of marketing audiovisual materials to non-profit educational institutions will be discussed in this article. The problem is acute because the Copyright Act of 1976 deals only incompletely with it while the legislative history discusses it at length.[2] This article will examine the deficiencies of the new Act and suggest interpretations of it. Instructors acquired both performance rights and copying rights under the Act. Both rights are circumscribed; the performance right rather carefully, the copying right rather confusedly. The two rights will be discussed separately and the owners' licensing of these rights will be analyzed. A discussion of legislative history is needed to an unwarranted degree to flesh out the brief statutory treatment of audiovisual materials in education; however, there is cause to recommend disregarding the history in some cases.

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[1] Letter from Peter F. Nolan, Office of Counsel, Walt Disney Productions, to author (Mar. 23, 1977).

[2] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C.A. § 101 (1977)). This law was signed by the President on October 19, 1976, and generally became effective on January 1, 1978. Its legislative history is as follows: House Conference Comm., 94th Cong., 2d Sess., Report on Copyright Law Revision, H.R. Rep. No. 94-1733 (1976); House Comm. on the Judiciary, 94th Cong., 2d Sess., Report on Copyright Law Revision, H.R. Rep. No. 94-1476 (1976) [hereinafter cited as House Report]; 122 Cong. Rec. 10872 (1976); Senate Comm. on the Judiciary, 94th Cong., 2d Sess., Report on Copyright Law Revision, Sen. Rep. No. 94-473 (1975) [hereinafter cited as Senate Report].

II. THE FIRST RULE: ALMOST ANYTHING GOES IN FACE-TO-FACE TEACHING

The 1976 Act has made the classroom an almost inviolable sanctuary for using copyrighted materials. Section 110(1) allows performance or display of *any* copyrighted work,[3] elaborating on Sections 1(c) and 1(e) of the 1909 Act. These sections gave exemptions from infringement liability to persons who performed nondramatic literary works or musical compositions in public and not for profit.[4]

Under the 1909 Act, it was generally assumed educators qualified for the "not for profit" exemption. The exemption appeared to allow them to perform, by reading aloud, books, periodicals, scripts prepared for oral delivery and, some believed, choreography and documentary motion pictures. In addition, they could perform music in class either live or as recorded.[5] Finally, included in this laundry list of works available to educators under the 1909 Act were items traditionally displayed in classrooms without question such as maps, works of art, and technical drawings.[6]

Even if educators paid any attention to the "for profit" exceptions in the 1909 Act, they were sure to be confused by the limiting term, "nondramatic literary work." For decades they had been performing dramatic works in the form of motion pictures with seeming impunity. This was because then, as now, most films are only available by lease from an authorized distributor.[7] Permission to perform the films for students was given in the lease, not in the statute.

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[3] Section 110(1) reads, in its entirety, as follows:

> *Limitations on exclusive rights: Exemption of certain performances and displays*
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
>
> (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made . . . .

17 U.S.C.A. § 110(1) (1977).

[4] 17 U.S.C. § 1(c),(e) (1971).

[5] M. NIMMER, COPYRIGHT § 107.1 (1963 & Supp. 1976).

[6] Under the 1976 Act these items are defined as "[p]ictorial, graphic, and sculptural works," and include "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams and models." 17 U.S.C.A. § 101 (1977).

[7] *See generally* Nevins, *Copyright, Property and the Film Collector,* 29 RUTGERS L. REV. 2 (1975).

Under the 1976 Act there is a welcome clearing of the air. Not only may all motion pictures be performed in the classroom of nonprofit educational institutions but all other dramatic works may as well. It is clear in the broad definition of the word "perform" in Section 101 that performance may be live or by mechanical means:

> To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

Unfortunately, the only other terms used in Section 110(1) which are defined in Section 101 are "audiovisual works," "copies," "display," and "motion pictures." It is curious that terms relating to education are left undefined in the Act. Instead, their definitions are unsatisfactorily discussed in the House and Senate Committee Reports and in the Conference Report. There is an open invitation in the House Report for the parties themselves to develop guidelines for off-the-air taping for nonprofit classroom use, but only as a means of clarification of the requirement that all copies used in teaching be lawfully made.[9] Such guidelines should also address the scope of the performance exemption and the missing definitions.

It is axiomatic that courts are bound only by definitions contained in the Act. The eminent authority on statutory interpretation, Professor Reed Dickerson, has stated concerning legislative history: "For legislatures, it would be a wise course never to create legislative history merely for the purpose of helping courts interpret or apply statutes."[10] Had the drafters of the Act been more generous with

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[8] 17 U.S.C.A. § 101 (1977).

[9] House Report, *supra* note 2, at 71-72. The Committee statement reads:

> The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The committee believes that a fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

Id.

[10] R. Dickerson, The Interpretation and Application of Statutes 195 (1975). Professor

definitions, their work would have been more complete. To illustrate the pitfalls in relying on legislative history for definitions, one may puzzle over a subtle difference in the Senate and House Reports in which they describe works which may be performed in class. The Senate Report says that "*a teacher or student* would be free to perform or display anything in class as long as the other conditions of the clause are met. *He* could read aloud from copyrighted text material, act out a drama, play or sing a musical work . . . ."[11] That Report was published November 20, 1975. The House Report, published on September 3, 1976, states that "*teachers or students* would be free to perform or display anything in class as long as the other conditions of classrooms teaching are met. *They* could read aloud from copyrighted text material, act out a drama, play or sing a musical work . . . ."[12] Was the change to the plural accidental and casual, or was it a clarification that envisioned ensemble performances in class? The latter interpretation is more probably the correct one. Analysis of the undefined terms is necessary.

III. The Mislaid Definitions for Section 110(1)

Restrictions on use of lawfully made copies in teaching seem disarmingly simple. Even a heretofore off-limits Broadway play or musical written solely for entertainment might be used by teachers if but four tests are met. The performance or display of the work must be (1) by instructors or pupils, (2) in the course of face-to-face teaching activities, (3) of a nonprofit educational institution, and (4) in a classroom or similar place devoted to instruction.[13]

Where only a one-room schoolhouse is concerned, these tests are sufficient to guide educators. The single "instructor" with one

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Dickerson goes on to say:

> The more realistic approach to legislative history would be to end or severely limit its judicial use. Aside from eliminating the wholly useless at its source, the most effective way to restrict use is through professional persuasion rather than fiat (even English judges have privately confessed to taking an occasional, surreptitious look at legislative history). So long as they are needed for other purposes, records of committee hearings and house debates should not be eliminated. However, because they are highly unreliable as a basis for inferring legislative intent, a court should refuse to consult them either for the purposes of cognition or for those of judicial lawmaking. Even for confirming results reached by legitimate means, they have little value.

Id.

[11] Senate Report, *supra* note 2, at 73 (emphasis added).

[12] House Report, *supra* note 2, at 81 (emphasis added).

[13] 17 U.S.C.A. § 110(1) (1977).

"classroom" would have no alternative to "face-to-face teaching" of "pupils." But the tests fail for lack of clarity when the one-room schoolhouse gives way to multiple classrooms on campuses with several buildings where many activities in addition to face-to-face teaching are carried out. These classrooms might have sophisticated electronic equipment and the audiovisual department might be able to transmit copyrighted materials remotely for performance in classrooms.[14] What do the terms in the tests mean in the context of the modern school? Educators must find the meanings in the legislative history, and, because this history will not be readily available to them, the meaning of the legislative history will be further interpreted for them in trade journals and the like.[15]

Audiovisual departments are the natural offices to interpret Section 110(1) for teachers, but it would appear they have little guidance from their administrations for doing this. Administrators tend to think of the school as owner of copyrights under the "works for hire" doctrine and not as user of copyrighted materials.[16]

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[14] *Id.* § 101. "To 'transmit' a performance or display it is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.*

[15] Useful guidelines have been published. Among the best are: Counsel from Legal Dep't, Nat'l Ass'n of Broadcasters, Copyright Q & A No. 5, Educational Use of Broadcast Programming Under the 1976 Copyright Revision Act (Jan. 1977) [hereinafter cited as Copyright Q & A No. 5]; Association for Educ. Com. & Tech. and Ass'n of Media Producers, Copyright and Educational Media, A Guide to Fair Use and Permissions Procedures (1977); EDUC. & INDUS. TELEVISION, Nov., 1976, at 22 (Smith, *The New Copyright Law: What You Can and Can't Do*).

[16] Under the "works for hire" doctrine, the school, as employer of the instructor, would be considered the author of whatever works the instructor creates. The school would thus own and be able to copyright such works. *See* 17 U.S.C. § 26 (1971) (§ 26 of the 1909 Act); Annot., 11 A.L.R. Fed. 457 (1972). Section 201(b) of the 1976 Act adopts the "works for hire" doctrine:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C.A. § 201(b) (1977). An instructional text, as defined in Section 101 under "work made for hire," is a work made for hire if specially ordered or commissioned. An "instructional text" is a "literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities." 17 U.S.C.A. § 101 (1977). Schools customarily have policies, sometimes stated formally in writing, whereby they waive copyright in instructional texts and other intellectual property created by their instructors but not specially ordered or commissioned. *See, e.g.*, University Policy on Copyrights and Other Property Rights, UNIVERSITY OF KENTUCKY ADMINISTRATIVE REGULATION AR 11-2.0-4 (1974). It has been established by case law that a lecture of a professor belongs to the professor. Williams v. Weisser, 153 U.S.P.Q. 866 (Cal. Super. 1967), *aff'd on other grounds*, 273 Cal. App. 2d 726, 78 Cal. Rptr. 542, 38 A.L.R. 3d 761 (1969). On January 4, 1977, a letter request-

A comment in the legislative history is of particular importance to educators who would transmit programs into the classroom: "Use of the phrase 'in the course of face-to-face teaching activities' is intended to exclude broadcasting or other transmissions from an outside location into the classroom, whether radio or television and whether open or closed circuit."[17] This crucial definition, submerged in the legislative history, is suggested in Section 110(2) of the statute itself, but only by implication. Section 110(2) declares that:

> performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission [is not an infringement of copyright] if—(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and (C) the transmission is made primarily for—(i) reception in the classrooms or similar places normally devoted to instruction . . . .

The negative implication of this language is that a transmission into the classroom may incorporate performances of no other copyrighted works than those mentioned. Thus, in the course of transmissions to classrooms, educators may read prose and poetry, play music, and display pictorial, graphic and sculptural works, but they may not use audiovisual works nor perform dramas or dramatic musical works, even though these may be performed live in classrooms.

Reactions of some organizations indicate Sections 110(1) and 110(2) are already being interpreted narrowly. The National Association protested the "face-to-face teaching" language, feeling it would indeed "rule out closed-circuit in-school uses as well as uses

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ing information on copyright policy was sent to twelve universities located within a 150-mile radius of Cincinnati by Cindy Sullivan, Director of Audiovisual Services, Northern Kentucky University. The following nine schools replied: Eastern Kentucky University, Indiana University, Kentucky State University, Miami University, Morehead State University, Ohio State University, University of Cincinnati, University of Kentucky, and Xavier University. None of them indicated awareness of an existing policy with respect to use of audiovisual materials. Perhaps the most frank answer was offered by Robert Dro, Director, Community Relations, Indiana University. After Mr. Dro related that he was informed as to what was occurring on his campus relating to copyright matters, he said, "As you can see, Indiana University actually has no definite policy. However, the subject has come up from time to time as to just what policy the University should have." Letter from Robert Dro to Cindy Sullivan (January 17, 1977).

[17] SENATE REPORT, *supra* note 2, at 73.

over dial—or remote—access system in schools, all of which are designed to bring materials to learners rather than transport learners to materials."[18] The National Association of Broadcasters gives an equally restrictive meaning to "face-to-face teaching," maintaining that the instructor, his pupils and the copy of the program utilized for a performance must all be located in the same classroom.[19]

These interpretations of "face-to-face teaching" ignore the distinction between large scale transmitting of copyrighted materials into many classrooms simultaneously and the harmless, isolated request by an individual instructor for an audiovisual performance in a single classroom. The centralized audiovisual department is most efficiently run by remoting visual and audio signals into classrooms, if equipped to do so.[20] Otherwise, equipment for performing works in the classroom must be shuttled from room to room, floor to floor, and from building to building, rain or shine. If such equipment as projectors and videotape players may be used in the classroom within the spirit of Section 110(1), why may they not be used for lawful performance from outside the classroom? The answer of media producers would parallel their reaction against unauthorized copying of films: the wider the nonpaying audience for a particular audiovisual product, the fewer the sales possible.[21] The open or closed circuit transmission of copyrighted materials greatly expands the use to which a single copy may be put. The restriction of one copy for one classroom attributed to the term "face-to-face teaching" effectively limits the number of pupils who might be exposed to a copyrighted work. Moreover, further interpretation of "face-to-face teaching" to mean the instructor must be present with the pupils where a performance takes place presents another obstacle to mass viewing by transmissions.[22]

It is justifiable that producers should be able to prevent mass viewing of their copyrighted works without payment or clearance since, by such viewing, schools would be substituting copyrighted materials for teaching staff. The producers have a legitimate claim to some of the savings; however, Section 110(1) can reasonably be interpreted to permit transmissions in lieu of in-class performances when requested by an instructor not acting in concert with any other personnel in the school. Such an interpretation is not contradicted by Section 110(2). When Section 110(2) is read together with Section 112(b) it becomes clear that it is addressed to instructional broadcasting.[23]

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[18] *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 275 (1975)(statement of James A. Harris, President, National Education Association)[hereinafter cited as *Hearings*].

[19] Copyright Q & A No. 5, *supra* note 15, Question 17.

[20] By using a film chain device, motion pictures may be transmitted electronically for reception on the television screens.

[21] *Hearings*, *supra* note 18, at 330 (Testimony of Edward J. Meell, Chairman, Educational Media Producers Council).

[22] SENATE REPORT, *supra* note 2, at 73.

The phrase in Section 110(1) requiring that exempt performances take place "in a classroom or similar place devoted to instruction" is defined in the Senate Report in terms of what is *not* a classroom. A performance in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, is not a performance in a classroom.[24] Once again there is protection for producers against mass viewing. What, then, of a course devoted to the study of modern drama or the film with enrollment restricted only by the size of an auditorium? Might packing students into such large "classrooms" violate the spirit of Section 110(1)? The Senate Report responds to the question negatively, maintaining that any place devoted to instruction can become a classroom. A studio, workshop, gymnasium, training field, library, the stage of an auditorium, or the auditorium itself may be used for systematic instructional activities without violation of Section 110(1).[25]

Here it is advisable to read the legislative history cautiously in some cases for the protection of producers. Large survey classes are routinely conducted in university auditoriums seating hundreds or thousands of students. By loosely defining the requirements for course credit, universities may violate the spirit of Section 110(1). There is a fine line between a class during which some illustrative dramas are performed and a drama series open to all students for credit, with large attendance, where the dramatic performances are only infrequently punctuated by comments of an instructor. The latter class may not be within the meaning of Section 110(1) especially "where the audience is not confined to the members of a particular class."[26] Factors tending to show that a class is not a sham would be prior enrollment of students a cut-off time not unreasonably late in the course after which a pupil may drop the course only with academic or monetary penalty, nonavailability of the course to pupils who wish merely to audit, and credit for the course toward a degree issued by the institution.

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[23] Section 110(2) of the 1976 Act, 17 U.S.C.A. § 110(2) (1977), specifies the types of copyrighted works which may be incorporated into teaching programs created by the schools themselves. Such programs might substitute for instructors teaching live in the classroom. Section 112(b), 17 U.S.C.A. § 112(b) (1977), permits schools to make up thirty copies of programs incorporating nondramatic literary or musical works or displays of works as permitted by Section 110(2), 17 U.S.C.A. § 110(2) (1977).

[24] SENATE REPORT, *supra* note 2, at 74.

[25] *Id*

Having dealt with the meaning of "classroom" and "face-to-face teaching" it is necessary to determine who may occupy the classrooms and who may engage in face-to-face teaching within the meaning of Section 110(1). "Pupils" are defined tersely in the Senate Report as "enrolled members of a class."[27] The Act would allow pupils to join with instructors in performing copyrighted works.

Defining "instructors" is problematical. Traditionally, a class is taught by one instructor but the Act will accomodate team teaching. The Act is silent as to whether guests brought into a classroom to perform a copyrighted work can be considered instructors. There is no logical basis for the remark in the Senate Report that payment or clearance is required for performances by actors, singers, or instrumentalists brought in from outside the school to stage a program.[28] If professional people wish to donate their time and perform in the context of face-to-face teaching in a classroom as part of systematic instruction, they should qualify for the instructors' exemption.[29] The key to their status as instructors is that they not be paid for performing. Their unpaid performance cannot be distinguished from the performance by an audiovisual technician (in a classroom) of a television broadcast, videotape, motion picture, or phonorecord.[30] In fact, another part of the legislative history does indicate that audiovisual directors are to be regarded as instructors when working in consultation with actual instructors.[31]

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[26] *Id.* The Senate Report maintains that it would not be permissible for teachers to perform a copyrighted work before a group some of whom are enrolled in the class and some of whom are not.

[27] *Id.* The author regrets that the word used in Section 110(1) is "pupil" instead of "student." "Student" is the nobler word, deriving from the Latin word "studens," which means "to be eager about study." "Pupil" applies "either to a child in school or to a person who is under the personal supervision of a teacher." "Student," on the other hand, is applied "either to one who attends an institution of higher learning or to one who is making a study of a particular problem." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2268, 1844 (1964). The drafters of the Act made their choices, and the author will follow their choice of words, including the word, "instructor," rather than "teacher."

[28] SENATE REPORT, *supra* note 2, at 74.

[29] Continuing the not-for-profit exemption in the 1909 Act, 17 U.S.C. § 104 (1971), Section 110(4) of the 1976 Act, 17 U.S.C.A. § 110(4) (1977), provides that public performance by anyone of a nondramatic literary work is exempt if there is "no direct or indirect admission charge." If performance of these works in public is exempt, then performance of them in face-to-face teaching must also be exempt.

IV. Off-the-Air and into the Classroom

Section 110(1) might seem like a Magna Carta for instructors who perform or display copyrighted materials in the classroom but it is illusory with respect to audiovisual materials.[32] It provides that motion pictures and other audiovisual works may not be performed in face-to-face teaching unless "lawfully made *under this title.*"[33] Under the title, however, no guidance is given for copying an audiovisual work to be used in teaching without payment or clearance, with the possible exception of Section 108(f)(3). That section permits a library or archives to reproduce and distribute by lending a limited number of copies and excerpts of an audiovisual news program, subject only to clauses (1), (2), and (3) of subsection (a) of Section 108. These clauses provide that no commercial use may be made of the news programs, that collections of the library or archives must be open to the public or available to all persons doing

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> To perform or display a work "publicly" means
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> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
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> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or separate places and at the same time or at different times.

17 U.S.C.A. § 101 (1977). Thus, performance in a classroom is a public performance. The author submits that anyone who is willing to perform in a classroom for pupils enrolled in a legitimate course of study becomes an instructor within the meaning of Section 110(1). 17 U.S.C.A. § 110(1) (1977).

[30] The terms "motion picture" and "phonorecord" are separately defined in Section 101 of the Act. Television broadcast, videotape, and motion picture are lumped together under the general term, "audiovisual work." 17 U.S.C.A. § 101 (1977).

[31] Senate Report, *supra* note 2, at 74.

[32] The twelve sections following Section 106, 17 U.S.C.A. § 106 (1977), that pertain to a copyright owner's exclusive rights, discuss the limitations on and the scope of these rights, but they provide little guidance on infringement by videotaping for educational purposes.

[33] Section 110(1) will, however, exculpate an instructor who, in good faith, believed the copy was lawfully made.

research in a specialized field, and that the copy of the news program must include a notice of copyright. Thus, nothing in the Act prevents an instructor from borrowing a news program and performing it in face-to-face teaching under Section 110(1), notwithstanding legislative history to the contrary.[34]

Even if this break in the statutory wall of silence were interpreted by courts and libraries to allow classroom performance, there would still remain a definitional trap for the instructor. Already there is debate on the meaning of "audiovisual news program" centering on whether it should include in-depth interviews on current news events, on-the-spot coverage of news events, commentaries on the news, and the like. Surprisingly, the documentary, one of the most desirable programs from the point of view of instructors, would sometimes be classified as a news program by the National Association of Broadcasters.[35]

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[34] The HOUSE REPORT, *supra* note 2, at 77, declares that Section 108(f)(3)

> is intended to permit libraries and archives subject to the general conditions of this Section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes . . . . The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a television broadcast tape off-the-air pursuant to this clause.

17 U.S.C.A. § 108(f)(3) (1977).

Not surprisingly, the National Association of Broadcasters follows the HOUSE REPORT interpretation. It says, "Libraries may lend the tapes only for use in research. A recipient of a copy of a television broadcast may not perform, copy or sell, whether or not for profit, a copy of the television news broadcast." Copyright Q & A No. 5, *supra* note 15, Question 14. *Quaere*: May a school or university audiovisual department which maintains a large collection of films, tapes, and the like, qualify under Section 108(a)(2) as a library? Is there another missing definition?

[35] The National Association of Broadcasters' statement, borrowing language from the HOUSE REPORT, *supra* note 2, at 77, says:

> This provision, Sec. 108(f)(3), applies to (1) the daily newscasts of the national networks, and local stations, which report events of the day; (2) interviews concerning current news events and (3) on-the-spot coverage of news events. It does not apply to documentaries (except documentary programs involving news reporting), magazine formats, or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

Copyright Q & A No. 5, *supra* note 15, Question 13. *Quaere*: How will they draw the line between a documentary program involving news reporting and other documentaries? Surely, their inclusion of documentaries, which might carry a message and be the product of considerable creativity, will be lamented if Section 108(f)(3), 17 U.S.C.A. § 108(f)(3) (1977), is read to allow performance of taped news programs by instructors. A leader in the debate over off-the-air taping, Ivan Bender, believes the definitional problem was not foreseen by Congress, and that networks do not regard such programs as "60 Minutes" (CBS), "White Paper"

In any event, the Section 108(f)(3) exemption to the exclusive right to copy inures only to libraries and archives. There is no specific exemption anywhere in the Act allowing instructors to copy audiovisual works. There is, however, a limited exemption for public broadcasters. Section 118(d) provides that a "public broadcasting entity," as defined in 47 U.S.C. 397, may incorporate in its programs published nondramatic musical works and published pictorial, graphic, and sculptural works. In the event clearance and payment cannot be agreed upon, the Copyright Royalty Tribunal will impose terms and reasonable royalty payments.[36] Nondramatic literary works were considered for inclusion in this compulsory licensing system but not included because "a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic and creative freedom."[37]

Section 118 is also linked to Section 110(1). Section 118(d)(3) provides that schools are permitted to copy programs of public broadcasters off-the-air insofar as they contain cleared nondramatic musical works and pictorial, graphic, or sculptural works. They may retain the copies for seven days and perform or display the contents in accordance with Section 110(1). The catch is that permission will still be needed from the public broadcaster (presumably the copyright owner) to copy the parts of the program not cleared under Section 118. Thus, the rights granted to instructors to copy off-the-air appear illusory.

(NBC), and "Issues and Answers" (ABC) as being within the purview of Section 108(f)(3). However, he would include a Presidential address to the nation, especially when the networks pooled their resources, even over objections that setting up equipment for such coverage requires enough creativity to be protected. Address by Ivan Bender, University of Kentucky Symposium I: Public Law 94-553 (Apr. 22, 1977) [hereinafter cited as Address by Ivan Bender]; *cf.* International News Serv. v. Associated Press, 248 U.S. 215, 234 (1918) ("[T]he framers of the Constitution [did not intend] to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it"); Bleistein v. Donaldson Litho. Co., 188 U.S. 239 (1903) (lithographs for use in advertising a circus possess the requisite creativity to be copyrightable); Burrow-Giles Litho. Co. v. Sarony, 111 U.S. 53 (1884) (photograph can be the product of "intellectual invention" and therefore copyrightable); Time Inc. v. Bernard Geis Assoc., 293 F. Supp. 130 (S.D.N.Y. 1968); Jeweler's Circ. Publ. Co. v. Keystone Publ. Co., 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir. 1922).

36. Perhaps noncommercial broadcasters, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Incorporated (BMI), the Society of European Stage Authors and Composers (SESAC), and music publishers will establish a blanket industry-wide fee to cover all music before the Tribunal imposes terms.

37. HOUSE REPORT, *supra* note 2, at 119.

As a practical matter, the Public Broadcasting Service, the Agency for Instructional Television, the Great Plains National Instructional Television Library, and the Public Television Library, on November 15, 1975, issued a Statement of Policy authorizing supplemental school rerecordings of public and instructional television programs for use for seven days.[38] This pioneer program operates to give schools off-the-air copying rights to all programs except those listed on a bi-monthly circular from the Public Broadcasting Service as not authorized for seven-day school use. For the most part, the excepted programs are licensed for broadcast by the Public Broadcasting System without rerecording rights.[39]

On September 1, 1976, the Agency for Instructional Television (AIT) broke away from the seven-day limit and permitted certain school districts to retain off-the-air rerecordings during the entire school year, September through June. Prerequisites are that the state education agency be authorized to broadcast AIT telecourses and the school systems be specifically identified as participants in the instructional television services of the agency. It is worth noting that the stated purpose of the experiment is "to test the extent to which unrestricted broadcast rerecordings will be used in classrooms. A further objective is to determine if such an extended use will increase school support for instructional broadcast services. Finally, it is hoped the experiment will provide insight into the effect of advances in recording and playback technology upon instructional broadcasting."[40]

(A) *"The Monarch Butterfly" Argument*

If there is no exemption allowing instructors to copy audiovisual works off-the-air, neither is there any explicit prohibition except for the exclusive right to make copies in Section 106(1). This exclusive right, in turn, is offset by the four tired guidelines for fair use in Section 107 which have been languishing in the wings, essentially unchanged since 1964.[41] The House Report, in discussing Section

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[38] Letter from Eugene N. Aleinikoff to author (Mar. 30, 1977).

[39] *Id.*

[40] Statement by Agency for Instructional Television, Extended Instructional Use of AIT Telecourses (Apr. 28, 1976).

[41] The SENATE REPORT mentions that they were contained in the 1964 bill. SENATE REPORT, *supra* note 2, at 62. Persons who have followed copyright revision have seen the guidelines so often that they veritably swim before their eyes. Out of necessity the final version of Section

107, declares that "there is ample case law recognizing the existence of the doctrine [of fair use] and applying it,"[42] but, in fact, there is no case law at all on the copying of audiovisual materials in a nonprofit setting as a fair use.[43]

Time, Inc. v. Bernard Geis Associates, the celebrated case involving fair use of the Zapruder film of the assassination of President Kennedy, is the only decided case which approaches making a statement about fair use of audiovisual materials in the classroom.[44] It was held that publishing charcoal sketches of frames from the film in a book, *Six Seconds in Dallas*, was a fair use because of the public

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107 should be set out here:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C.A. § 107 (1977). Recently, a court construed Section 107 and called the doctrine of fair use the principal difference between the protection afforded by a copyright and that given by a patent. New York Times Co. v. Roxbury Data Interfare, Inc., (D.N.J. 1977), reported in 333 Patent, Trademark & Copyright J., June 26, 1977.

[42] House Report, *supra* note 2, at 65; *cf.* Rosemond Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

[43] The two cases involving instructors copying intellectual materials for classroom use without payment or clearance have involved only print media: Wihtol v. Crow, 199 F. Supp. 682 (S.D. Iowa 1961), *rev'd*, 309 F.2d 777 (8th Cir. 1962) (choral director of an Iowa high school prepared a new arrangement of the plaintiff's copyrighted song, "My God and I," and manufactured 48 copies on the school duplicating machine) and MacMillan Co. v. King, 223 F. 862 (D. Mass. 1914) (tutor at Harvard distributed to his students 30 summary sheets of chapters in economics textbook). These two cases did yeoman duty in the many law review articles on photocopying of medical journals by the National Institutes of Health Library. Williams and Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (equally divided decision). The decision allowing the photocopying as a fair use was discredited in a passage of the Senate Report: "The recent case of The Williams and Wilkins Company v. The United States failed to significantly illuminate the application of the fair use doctrine to library photocopying practices." Senate Report, *supra* note 2, at 71. A dissenting judge called it the *Dred Scott* decision of copyright law. 487 F.2d 1345, 1387 (Nichols, J., dissenting). For discussion of two pending cases on videotaping of copyrighted works, see notes 47 and 51 *infra*.

[44] 293 F. Supp. 130 (S.D.N.Y. 1968); *cf.* Rosemond Enterprises, Inc. v. Random House, Ind., 366 F.2d 303 (2d Cir. 1966).

interest in having the fullest information available on the assassination. Can the holding be made to stand for a similar interest of pupils in having information of national importance or of special importance to a particular class? The case has "not-for-profit" implications because Bernard Geis Associates offered to pay *Life* magazine a royalty equal to the profits from publication of the book in return for a license, but *Life* refused. Moreover, subjects of the case were actually photographs registered as such when *Life* published individual frames from the film, and to that extent there was no audiovisual question.[45]

The situation in which a private citizen, the actor Roddy McDowall, obtains unauthorized copies of commercial motion pictures for his private use invites comparison.[46] So does the situation in which a private citizen uses a videotape recorder to record a television program off-the-air.[47] If the use of a videotape machine in the home results in build-up of private libraries of programs, it becomes apparent that the potential market for reruns of the programs could be affected. In like manner, educational media producers argue that build-up of an unauthorized library in audiovisual departments of schools and universities affects their potential market.[48] Moreover, media producers do not see an analogy to guidelines for photocopying of print media by educators.[49] These guidelines quantified the amount that could be copied by using word counts. For example, the guidelines allowed copying of not more than 250 words of a poem nor 2,500 words of a complete article, story or essay and no more than two excerpts from the same author nor more than nine instances of copying for one course during one class term.[50] Such quantification alone was not satisfactory to media producers as a guideline and their talks with educators broke down before any guidelines could be given to the House Committee on the Judiciary.[51]

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[45] Section 101 includes this definition:

> "Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

17 U.S.C.A. § 101 (1977).

[46] 17 U.S.C.A. § 107(4) (1977). According to the New York Times, more than 500 films and television shows were removed from Mr. McDowall's house by federal authorities on December 18, 1975 as part of a crackdown on a film piracy ring. Mr. McDowall is reported to have admitted purchasing a number of films from Ray Atherton, who, allegedly, was a dealer in unauthorized copies. N.Y. Times, Jan. 18, 1976, at 36, col. 1. Later it was reported that, on June 2, Assistant U.S. Attorney Chester Brown declined to indict Mr. McDowall, apparently because there was no evidence that he had offered copies for sale. Had he done so, he could have been indicted for willful infringement for profit under Section 104 of the 1909 Act (17 U.S.C. § 104 (1971)), a misdemeanor. *Id.*, June 3, 1976, at 25, col. 1. This left unanswered the question of the extent of Mr. McDowall's civil liability for infringement for showing the films privately and not-for-profit. *See generally* Nevins, *supra* note 8.

[47] A test case on this issue has been filed in Los Angeles against Sony Corporation of America and others by Universal City Studios and Walt Disney Productions, Inc., Wall St. J., Nov. 15, 1976, at 4, col. 1. There is speculation that the suit was filed to protect not only TV programs, but also a multimillion dollar investment by MCA, Inc., parent of Universal City Studios, which, with N. V. Phillips, a Netherlands corporation, has developed a video-disc playing system for home use. Since the video-disc player would have no capability to record off-the-air, the owner of the machine would depend upon MCA to supply the prerecorded discs. The Sony Betamax machine, capable of recording off-the-air, could reduce sales of these discs if it were legal to use it. No one knows how a prohibition on the use of videotape recorders in the home can be enforced. Many other articles have appeared in newspapers and periodicals about the Betamax case and videotape players. *See, e.g.*, TIME, Apr. 11, 1977, at 64; THE CHRONICLE OF HIGHER EDUCATION, Apr. 11, 1977, at 5; Wash. Post, Dec. 21, 1975, § 7, at 1, col. 1.

The reason media producers would not accept quantification is that small portions of a tape or film might represent the most valuable part of it, and that therefore a quality test must be added to the quantity test. For example, a brief sequence showing a monarch butterfly emerging from the cocoon might be the essence of an educational film about the monarch butterfly and its most costly part to produce.[52] Similarly, the few seconds of footage by Abraham Zapruder showing the assassination of President Kennedy might be the most valuable part of an otherwise routine television program. The issue is complicated by the decision in *Time, Inc. v. Bernard Geis Associates* which clothed the frames of the assassination with a public interest that, when read with Section 108(f)(3) (which permits archival copying of news programs), might well mean that instructors may copy it off-the-air for use in the classroom.[53]

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[48] *Hearings*, *supra* note 18, at 330 (Testimony of Edward J. Meell). Ivan Bender maintains that sale of fifty to seventy-five prints of an educational film makes it a best-seller. The producers' investment in such a film is $2,000 per minute, or more. Address by Ivan Bender, *supra* note 35.

[49] *See* House Report, *supra* note 2, at 67-72.

[50] *Id.*

[51] Address by Ivan Bender, *supra* note 35. Irwin Karp, counsel for Authors' League of America, Inc., maintains that quantitative guidelines were essential to an agreement on educational fair use of print media. Address by Irwin Karp, Indiana University Conference: The Copyright Dilemma—A Rational Outcome (Apr. 14-15, 1977). Perhaps guidelines will emerge from the decision in a suit filed in United States District Court for the Western District of New York (seated in Buffalo) by Learning Corporation of America, Time-Life Films, Inc., and Encyclopaedia Britannica Educational Corporation against the Board of Cooperative Educational Services (BOCES) in the First Supervisory District, Erie County, New York. Significantly, named also as defendants were Joseph Plesur, director of the media center, his chief engineer, and other staff. Allegedly they distributed a 200-page catalogue listing videotape copies made off-the-air without clearance or payment. These were made available on request for performance in classrooms. It is doubtful that it would be in the best interest of educators to win a complete victory, since carte blanche copying privileges could force some producers of educational works out of business. Educ. & Indus. Television, Dec., 1977, at 6.

[52] Address by Ivan Bender, *supra* note 35. Edward Meell made the point well in his statement to the House Committee on the Judiciary:

(B) *Section 504(c)(2): Protection for Instructors; Peril for Audiovisual Directors*

Where copying is done for educational use and the part to be copied cannot reasonably be classified as news, the decision on the legality of the copying will rest, for practical purposes, with the audiovisual director. It has been seen that school administrators have little concerned themselves with the issue of copyright infringement and when they do promulgate a policy, it will probably devolve upon the audiovisual department to enforce it.[54] In these circumstances, the director faces exposure to liability under the Act and might stand alone with the instructor as defendant in some cases should the doctrine of sovereign immunity protect state and local public schools.[55] The remedies available to plaintiffs include,

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> The concept of "brief excerpts" (which are not substantial in length in proportion to their source) is very difficult to apply to educational audiovisual materials. A half hour education, nature or biology film, for example, may be built around an exceedingly difficult photographic sequence which may take months of work to capture, but may in the final product only take up a minute or two of time in the film. To permit this minute or two to be reproduced freely under an educational exemption would very likely destroy the economic viability of the product.

Hearings, *supra* note 18, at 316.

[53] See discussion of House Report, *supra* note 2, at note 34 *supra*.

[54] See note 16 *supra*.

[55] There is little case law on the issue. In Wihtol v. Crow, the trial court rendered judgment for the school choral director, Nelson Crow, not finding his actions in arranging and copying Austris Wihtol's copyrighted song to be an infringement. As to the school's liability, the court said, "[I]n the exercise of its governmental function it is not liable for tort claims. [citations omitted]. Under the doctrine of governmental immunity the defendant, Clarinda, Iowa School District, cannot be held liable for the copyright infringement alleged herein." 199 F. Supp. 682, 685.

On appeal, the decision was reversed. 309 F.2d 777 (8th Cir. 1962). The court of appeals held that Mr. Crow was an infringer, but upheld the immunity of the school under the eleventh amendment to the United States Constitution, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The plaintiff had been represented as under the 1909 Act, actual or statutory damages. But, under the 1976 Act, audiovisual directors and their staffs benefit from the umbrella of protection against statutory damages in Section 504(c)(2), which provides: "The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under Section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution . . . ."[56] Here appears another part of the Magna Carta for educators contained in the Act.[57]

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by Melville Nimmer, who criticizes the immunity holding in his treatise. M. **Nimmer**, *supra* note 5, § 131.42.

In Mills Music Co. v. Arizona, 187 U.S.P.Q 22 (D. Ariz. 1975), the court found the state to be an infringer when it broadcasted the song, "Happiness Is," with special lyrics to promote the 1971 Arizona State Fair. The court made no mention of immunity, but the issue is before the Ninth Circuit Court of Appeals.

In an early case, it was held that a compiler of Michigan laws, who used plaintiff's annotations, was not immune from copyright infringement liability under the eleventh amendment merely because he acted under authority of his contract with the State. Howell v. Miller, 91 F. 129 (6th Cir. 1898). The decision would not, however, stand for liability of an audiovisual director if he or she made copies under authority of the State and used them only within the school, for the court said:

> If this suit had as its only object a decree disturbing the State's possession of that manuscript, and ordering the surrender of it to the plaintiff, or its destruction, so that it could not be used, we should say, according to the rule of Belknap v. Schild, that such a suit would be one against the State and could not be entertained.

91 F. at 136.

[56] 17 U.S.C.A. § 504(c)(2) (1977).

[57] Section 504 reads in full as follows:

> Remedies for infringement: Damages and profits
>
> (a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—
>
> (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or
>
> (2) statutory damages, as provided by subsection (c).
>
> (b) Actual Damages and Profits.—The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.
>
> (c) Statutory Damages.—
>
> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court

The absence of this remedy could render educators safe from prosecution by producers because statutory damages are "a cornerstone of the remedies sections of the bill."[58] Relegated to proving actual damages and loss of profits, and with scant hope of recovering costs and attorney's fees under Section 505 in view of the protective intent manifested by Section 504(c)(2), producers might well stay out of court when an educator is the target.

With these protective provisions in mind, the instructor might feel comfortable in copying, but the audiovisual director will not. If unauthorized copying is being done with departmental equipment,

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> considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

17 U.S.C.A. § 504 (1977). Giving broad meaning to the word "teacher" so as to include directors was the subject of a remark by Congressman Robert W. Kastenmeier of Wisconsin during the House Floor Debate on S.22:

> Another question involves the reference to "teacher" in the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions," reproduced at pages 68-70 of the committee's report No. 94-1476 in connection with section 107. It has been pointed out that, in planning his or her teaching on a day-to-day basis in a variety of educational situations, an individual teacher will commonly consult with instructional specialists on the staff of the school such as reading specialists, curriculum specialists, audiovisual directors, guidance counselors, and the like. As long as the copying meets all of the other criteria laid out in the guidelines, including the requirements for spontaneity and the prohibition against the copying being directed by higher authority, the committee regards the concept of "teacher" as broad enough to include instructional specialists working in consultation with actual instructors.

122 Cong. Rec. 10875 (1976).

[58] Senate Report, *supra* note 2, at 143. *See generally* Wasserstrom, *An Analysis of the Infringement Sections of the Copyright Code and Chapter 5 of S.22*, 1976 N.Y. Law Sch. L. Rev. 271.

it is likely to include systematic copying of whole works rather than parts of the works. Moreover, if anyone in the school is likely to be aware of the interpretive problems of the 1976 Act as it applies to copying, it is the audiovisual director. Section 504(c)(2) does not protect them from intentional infringement and, while individual producers might not have incentive to redress loss of isolated sales, their economic loss could be measurable if a film series were transmitted over closed circuit without permission. Closed circuit rights are being offered under licenses costing thousands of dollars to a single licensee.[59] Here, injunctive relief alone is appropriate.[60]

Returning to the monarch butterfly, it appears that unauthorized copying of a small segment from an audiovisual work presents a *de minimis* case against educators. Should a producer wish to incur the expense of obtaining an injunction, the defense would be advised to ask for new guidelines for fair use of parts of an audiovisual work. Educators will argue they have no way to know in advance what parts of a film or program meet the quality test as well as the quantity test. Rather, the owners should specify the sequences of each film that may not be copied without permission or suffer the implication that sequences not reserved may be copied. Designations of reserved segments of works may be placed in the title material, in catalogues, and on packaging. Audiovisual personnel will become used to looking for them. An owner of a televised work wishing to prevent off-the-air videotaping may identify reserved sequences in a message preceding the telecast. For example, "The sequence in this program of a butterfly emerging from the cocoon may not be copied off-the-air for educational use without prior written permission from [the company]." Such a warning would be no more out of place than the familiar "parental discretion advised" notices.

With owners able to protect their most valuable sequences, there should be no difficulty in allowing the rest of their works to be copied on a percentage basis. Such a system is appealing in that the quantity rule for educational copying may be stated in one sentence. For example, "Up to 10% of any audiovisual work may be copied off-the-air or otherwise for educational use under Section 110(1) except for sequences identified by the owner on the work which may not be copied under any circumstances without permission."[61] Because of the face-to-face teaching limitation in Section 110(1), there would be no appreciable likelihood of loss of revenue to the owner. Closed circuit use of sequences in multiple classrooms would be a matter for licensing.

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[59] See text accompanying notes 68-69 *infra*.

[60] 17 U.S.C.A. § 502 (1977). It is interesting to speculate on the outcome of a request for relief under Section 503: "Remedies for infringement: Impounding and Disposition of Infringing Articles." Under this section, a court may order destruction of both unauthorized copies and the equipment used to make them. It is improbable that a court would go so far as to deprive a nonprofit educational institution of its audiovisual equipment. Indeed, the doctrine of sovereign immunity and the eleventh amendment could prevent any seizure of state-owned copies. See note 55 *supra*.

There remain the problems of spontaneity and cumulative effect. The print media guidelines deal with these, but in the audiovisual context they are unduly complicated.[62] The rule should be retained that the copying must be at the instance and inspiration of the individual teacher because any systematic copying for many classes should be the subject of licenses. However, the requirement that individual instructors must request permission unless "[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply" is vague and unreason-

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[61] Compare this with a provision in the Guidelines for Educational Uses of Music:

> 2.(a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not constitute a performable unit such as a section, movement or aria, but in no case more than (10% of the work). The number of copies shall not exceed one copy per pupil.

HOUSE REPORT, *supra* note 2, at 71.

[62] *Id.* at 67-72. The tests for spontaneity and cumulative effect must be met, as well as the quantity test, in order for an instructor to make multiple copies of print media for classroom use:

> *Spontaneity*
>
> (i) The copying is at the instance and inspiration of the individual teacher, and
>
> (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.
>
> *Cumulative Effect*
>
> (i) The copying of the material is for only one course in the school in which the copies are made.
>
> (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
>
> (iii) There shall not be more than nine instances of such multiple copying for one course during one class term.
>
> [The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

Id. at 69.

able.[63] If an individual instructor wishes to use a permitted excerpt year after year with the limits of Section 110(1), there is no compelling reason for imposing a requirement continually to check with the owner. A cumulative effect test should prohibit instructors from putting together sequences from the same work so as to subvert the quantity guidelines. There should also be no limit to the number of courses in a school in which an excerpt may be used independently. There would be safeguard enough for owners in the prohibition on use of reserved segments. Unless an owner offers segments under a convenient license arrangement it would seem reasonable for educators to copy and use in classrooms up to 10% of the remainder of an audiovisual work with appropriate credits, without editing the segment and without incorporating it in any other work.[64]

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[63] *Id.*

[64] The integrity of a work is a growing concern of producers and owners. *See* Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976); Comment, *Education and the Copyright Law: Still an Open Issue*, 46 FORDHAM L. REV. 91, 125-26 (1977). The author proposes the following guidelines for off-the-air videotaping:

> (e) EXEMPTED USES: TAPING OF BROADCASTS.—Notwithstanding the provisions of section 106, it is not an infringement of copyright for a school to—
>
> (1) make tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of copyrighted works for a subsequent use in a current learning activity, provided—
>
> (A) the work taped is not available for purchase or rental in the same or a substantially similar format;
>
> (B) the tape is retained only as long as is necessary, not to extend beyond the end of a current learning activity for which the tape was made;
>
> (C) the taping is done to satisfy a spontaneously arising need presented by a current learning activity;
>
> (D) the taping is not part of a systematic practice, such as the regular taping of all such broadcasts by a media specialist; and
>
> (E) the tape is not used as a substitute for rental or purchase of another work which would otherwise have taken place.
>
> (2) make and retain tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of current news events, provided—
>
> (A) the substantial nature of the broadcast is current news, not original creations such as editorials or documentaries; and
>
> (B) the tapes, if retained, are not used for any purpose except subsequent learning activities, scholarly research, or preparation for the conduct of learning activities.

Id. at 134. Essentially, this proposal would allow off-the-air videotaping of an entire work for use during "current learning activity" except when the work is for sale or rent. How long is a "current learning activity"? What if the work is not for sale or rent but a license is available? Is videotaping of excerpts ever a fair use? The author does not address these questions. The

V. Contractual Control of Copying and Performance

Unlike print media owners, audiovisual media owners have experimented with licensing agreements during the pendency of the 1976 Act.[65] Most of the licenses contemplate use of a whole work. However, one plan, Encyclovideo, offers copying of excerpts from the entire backlist of Encyclopedia Britannica Educational Corporation.[66] In Encyclovideo, each film is broken down into excerpts which are then cross-indexed in several ways.

The Encyclovideo system, limited to the films of one producer, does not have the advantages of the industry-wide approach of print media owners in their Copyright Clearance Center (CCC). The American Association of Publishers with guidance from the Commission on New Technological Uses of Copyright, made the CCC operational on January 1, 1978.[67] Journal articles have been published with codes informing all potential users what they must pay the CCC. Anyone at a participating copy center may pay the fee and make photocopies. The fee is sent to the CCC which, with the aid of codes read by computer, remits proceeds to publishers. There are still the problems of affording authors the right to withhold permission to copy and of maintaining Department of Justice clearance for antitrust aspects of the program.[68]

Warrenton, Virginia Conference revealed that, at the least, educators want seven-day rights to videotape any work off-the-air without payment or clearance. See note 74 *infra*.

[65] Even the Williams and Wilkins Co. made a abortive attempt to license the National Institutes of Health Library for photocopying. 487 F.2d 1345 (Ct. Cl. 1973).

[66] *See* Encyclopedia Brittanica Corp., Encyclovideo Catalogue, A Computer-Generated Master Index of Film Footage from Encyclopedia Brittanica Corporation.

[67] *See* American Ass'n of Publishers, Program for the Provision of Copies of Technical-Scientific-Medical Journal Articles and for Related Information-Service Copying (Mar. 17, 1976); 345 PATENT, TRADEMARK & COPYRIGHT J., Sept. 15, 1977, at A-5.

[68] *See* PUBLISHER'S WEEKLY, Apr. 11, 1977, at 28. It is interesting to note that the Program contemplates developing, along with publishers, authors, and library associations, new guidelines for fair use of journal articles, only temporarily using those guidelines now contained in the House Report as interim guidelines. See text accompanying note 41, *supra*. It is not clear whether libraries will participate in the plan, or, by their disinterest, force the establishment of print-supply centers. Libraries would have increased administrative costs. Section 108(f)(1), 17 U.S.C.A. § 108(f)(1) (1977), exempts libraries (not just public libraries), archives, and their employees from liability arising from the unsupervised use of reproducing equipment located on their premises provided the equipment displays a warning notice that the making of a copy may be subject to the copyright law. An almost identical program involving textbooks was described in Comment, *The Effect of the Fair Use Doctrine on Textbook Publishing and Copying*, 2 AKRON L. REV. 64, 65 (1969). In a business review letter dated September 1, 1977, the Antitrust Division of the Justice Department declared that "the

Audiovisual licenses often combine rights to copy and rights to perform, and the licensor considers several criteria to arrive at a fee.[69] For example, a license to perform might be triggered at no extra cost simply with the purchase of a program on the state level as in the case of the AIT Policy, or the licensor might charge separately for performance rights per copy, per student, per monitor, per building, per school, per district, per campus (with or without branch campuses), or per state system, and for transmission over closed circuit, open circuit, or otherwise. For example, the BFA Videotape Duplication Plan allows the user to make annual payments based on titles to be copied and on the number of students in the school district. Upon payment of the copying fee, the licensee is granted rights for unlimited copying of titles.[70]

Licenses may provide for making copies from purchased copies or from borrowed copies, but if a program is expected to have wide appeal, the most efficient system is licensing to copy off-the-air. The first such license was the License to Make and Use Off-Air Recorded Video Cassettes of the thirteen-episode series, "The Age of Uncertainty," offered in early April, 1977 by Films Incorporated.[71] For the first time, a company obtained from the owners of a televised series not just the traditional rights to market films and videocassettes, but also the right to license schools to copy off-the-air. Off-the-air rights benefit licensees in that they may purchase the series for half the price of 16 mm film and about two thirds the price of the videocassette format.[72] They benefit the licensor by saving the expense of preview copies which are customarily sent to audiovisual departments as a necessary marketing device.[73]

Division has no present intention of challenging the organization or operation of the [Copyright Clearance] Center under the antitrust laws." 344 PATENT, TRADEMARK & COPYRIGHT J., Sept. 8, 1977, at A-2.

[69] *See generally* W. CARSON, LICENSING A-V MEDIA: ONE STEP AHEAD (I. Bender ed. 1975).

[70] *Id.* at 5.

[71] Films Inc., "The Age of Uncertainty" (A BBC series with John Kenneth Galbraith, co-produced by KCET-Los Angeles). Announcement of this license was immediately hailed as a new concept in copyright licensing. *See* VARIETY, *Copyright Twist: Sell Licenses to TV Show Pirates*, Apr. 6, 1977, at 2.

[72] *Id.* See also note 74 *infra*.

[73] Even with the obvious advantages available under an of-the-air license, sales were not satisfactory three months after its introduction. The Sales Manager of Films Incorporated speculates there might be two reasons. First, there is some doubt about the popularity of the series among educators. Second, the broadcasting began in May near the end of the school year. The company believes that, logically, the license concept must be acceptable because

There are several business hazards in sending out preview copies. The copy might be damaged by carelessness of the previewer, might not lead to a sale, or might be copied without permission. In fact, the making of pirated copies off-the-air or from preview copies has already given rise to a copyright infringement suit.[74] Instead of litigation, licensors have tried to rely on the contractual device of certificates of destruction or erasure. For example, the Films Incorporated license carries a privilege to make an off-the-air copy of each episode for preview use only for fifteen days, but failure to supply the licensor with a certificate of erasure within that time shall be deemed a purchase of the license for that episode.[75] Failure to com-

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it offers the quickest and cheapest way to preview a program. The company plans to continue offering such licenses. Interview with Herbert A. Schiff, Vice-President and National Sales Manager of Films Incorporated (June 28, 1977).

[74] When an upstate New York school system reportedly circulated a catalogue listing bootleg videotapes of educational programs for sale to other schools, it appeared a test case was in the making by a number of distributors. The Register of Copyrights then requested a conference on July 19-22, 1977, in Virginia, at which representatives of the parties would address the problem of off-the-air videotaping. Address by Barbara Ringer, Register of Copyright, University of Kentucky Symposium I: Public Law 94-553 (Apr. 22, 1977). The suit was nevertheless filed. See note 51 *supra*. The conference which resulted was described as follows:

> The "Conference on Videorecording for Educational Uses," sponsored jointly by the Copyright Office and The Ford Foundation, was held July 19-22, 1977 at Airlie House in Warrenton, Virginia. The conference was attended by roughly 80 participants, who were divided into five working groups chaired by the following:
>
> Group I—Barbara Ringer, Register of Copyrights
> Copyright Office
> Group II—Jon Baumgarten, General Counsel
> Copyright Office
> Group III—Richard Lacey, Consultant
> Ford Foundation
> Group IV—David Davis, Officer in Charge,
> Communications Program, Ford Foundation
> Group V—Lewis Flacks, Special Legal Assistant
> to the Register of Copyrights, Copyright Office

Letter from Linda Cox, Secretary to the Register of Copyrights, to author (Oct. 28, 1977).

[75] The license provisions read in full:

> 1. OFF-AIR TAPING AND PREVIEW: FILMS INC. grants to LICENSEE and LICENSEE hereby accepts from FILMS INC. a limited nonexclusive license under copyright as follows:
>
> a. LICENSEE shall have the right to record off-the-air, on videotape, from a commercial telecast or otherwise, one copy only of each of the programs listed above or as may, from time to time, be added to this Agreement by a schedule B or Supplements thereto.
>
> b. Unless otherwise stipulated by FILMS INC. for recording of multi-episode series, LICENSEE shall have fifteen (15) days following the date the program is recorded by it to determine whether it desires to license such program for its use under the terms of this Agreement. During such fifteen day period LICENSEE may exhibit the video

ply with the requirement to supply a certificate of destruction gives the licensor the option of suing in state court for breach of contract or in federal court for the tort of infringement of copyright.[76] Certificates of erasure cannot be required without a contract providing for them; but the fact that certificates of erasure can only be required under a contract does not mean they should not be asked for where there is no license. By contrast, in the Public Broadcasting Service Statement of Policy, schools that have recorded off-the-air under the seven-day privilege are merely requested to erase or destroy copies at the end of seven days.[77] It is interesting to note that this seven-day privilege to record and perform in an accredited nonprofit educational institution applies to "The Age of Uncertainty Series" and that instructors may either use the series free for seven days or acquire a license to use it indefinitely.[78]

VI. CONCLUSION

The Warrenton Conference reports reveal there is no agreement among educators and owners on the propriety of videocopying off-the-air.[79] Some owners would allow copying only for previewing;

> tape copy of the program only to those persons who are involved in the administrative decision as to whether the program should be licensed for use by LICENSEE under the terms of this Agreement. LICENSEE shall have the option, prior to the end of such fifteen (15) day period, to furnish FILMS INC. with a Certificate of Erasure in the form attached hereto as Exhibit C in which event this Agreement shall be inapplicable to such program. In the event LICENSEE does not furnish FILMS INC. with a Certificate of Erasure within the required time, it shall be conclusively presumed that LICENSEE desires to use the videotape copy of the program under the terms and conditions contained herein.
>
> c. Any action by LICENSEE with respect to the videotape copy of the program other than the permitted showing as provided in subparagraph b. of this paragraph 1. shall be deemed a copyright violation.

It would appear that the part of the license granting performance rights will have to be rewritten to be in conformity with the 1976 Act. It would read:

> FILMS INC. grants to LICENSEE and LICENSEE hereby accepts from FILMS INC. a limited nonexclusive license under copyright to exhibit the videotape copy or copies pursuant to this Agreement during their useful life to nonpaying *private* audiences . . . .

As noted, a performance in a classroom is a *public* performance. See note 29 *supra*.

[76] Twentieth Century Fox-Film Corp. v. National Publishers, Inc., 294 F. Supp. 10 (S.D.N.Y. 1968); Twentieth Century Fox-Film Corp. v. Peoples Theatres of Ala., Inc., 24 F. Supp. 793 (D. Ala. 1938); Metro-Goldwyn-Mayer Distrib. Corp., 3 F. Supp. 66 (D. Mass. 1933); *see* M. NIMMER, *supra* note 5, § 130.

[77] See text accompanying notes 38-39 *supra*.

[78] See note 75 *supra*.

[79] See note 74 *supra*.

others would allow none at all.[80] Even if the premise of some copying for performance under Section 110(1) were accepted the number of days or weeks the copy could be used would be contested.

Owners expect that, soon after copying, the copies must be paid for, perhaps after seven days, while educators speak in terms of semesters and quarters.[81] After the time for use without payment has run, either payment or erasure must occur. What controls will be acceptable to owners? Would certificates of erasure by the hundreds of thousands kept on file be a meaningful control? Would school administrators assume responsibility for keeping them or, as in the past, show little interest in the problem of videocopying?[82]

While complete works may eventually be copied under controlled circumstances the question of unauthorized use of excerpts remains. It is not analogous to photocopying excerpts from the print media. Those owners are not as sensitive to the value of a particular part of a work, but audiovisual media owners want to control copying of especially costly and desirable excerpts. Nothing in Section 107 on fair use denies this right but it might be in the owners' interest for permission to be stated on the work itself to copy a standard 10% for classroom use while reserving certain portions as available only by license. Perhaps this policy would lessen the tension that exists between owners and educators.

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[80] *Id.*

[81] Working Group I observed that the period might either start from the first broadcast of a program or from any broadcast, even a rerun, provided that copying a rerun might be prohibited where the program is available for licensing.

[82] See note 17 *supra*. In addition to the requirement of erasure, other principles for the protection of owners seem desirable. A particularly well-drafted statement of them emerged from the Warrenton Conference:

> Where an entire work is reproduced, the appropriate credits and the copyright notice should be included in all cases. Where an excerpt is reproduced, the work from which it is taken should be identified, and the copyright notice should be reproduced unless impracticable (*e.g.* stock footage).
>
> The following practices would be prohibited under the doctrine of fair use:
>
> a. the making of more than a single copy by or for a particular teacher;
>
> b. any transfer, distribution or use of the copy made under the fair use doctrine outside the educational institution;
>
> c. Reproduction of "theatrical" or "feature" films (i.e., films previously distributed for public showing other than on television), inasmuch as these are available through licensing arrangements for educational use.
>
> d. Off-air taping of broadcasts by an educational institution, not at the specific instance of an individual teacher.

APPENDIX III. ADDITIONAL STATEMENTS

1. Off-Air Taping and Public Education Position Paper

(Prepared by Charles W. Adams, supervisor, media services, Phoenix Union High School District, Phoenix, Ariz.)

The complex issues involved in determining the eventual guidelines for off-air taping deserve wide dissemination and full-discussion by individuals and institutions that will utlimately be affected by the approved guidelines. This paper attempts an analysis of the role of television in public education and presents the arguments supporting off-air taping guidelines that will facilitate appropriate use of television in the schools.

It is also assumed that the issue is off-air taping of broadcast television and not the unlawful reproduction of audiovisual materials, available only through commercial vendors. Broadcast television is available free to the entire population. Viewers have almost no influence on programs telecast by local stations and national networks. Stations and networks offer programs free-of-charge over the public airways. The reception of those programs has not and should not be, regulated or restricted by the government.

Without legislative action to the contrary, video recorders, equipped with television tuners, may be used to record a "legal" copy of a broadcast television program. Possessing a legally recorded copy, educators must be allowed to utilize that copy in their mission of educating students.

The "spirit of fair use" clearly has allowed educators to make copies of other types of media to enhance and facilitate learning. At this time, in the midst of the electronic age, off-air taping guidelines should also insure that educators can use broadcast television to enhance and facilitate learning. Clearly, as this paper will show, the fair use doctrine mandates that Congress approve guidelines that will allow appropriate use of broadcast television programs by non-profit educational institutions.

SECTION 1.—RATIONALE—SUPPORTING OFF-AIR TAPING

1. *Television—An enormous force.*—Television is an enormous force which has been let loose upon America; exercising all sorts of influences—social, moral, and political.

Besides having an enormous influence, television is the principle medium of "future shock" bringing nations and peoples face-to-face. Critics charge that television has created a society that is bewildered by change, uncertain of what to do with opportunities. Yet, with curious indifference viewers rarely regard this power as anything more than a money-getting entertainment machine. Few people, who fondly believe they control television, ever stop to think of television as the most tremendous and far-reaching power of social change which has ever blessed or cursed mankind.

The Carnegie Commission's 1979 report noted that "American radio and television are not just instruments of the market-place; they are social tools of revolutionary importance". The Commission recommends that society must use television to build a better society. Public education is ready to accept the challenge of utilizing television to better prepare students to survive in the latter quarter of this century. Without the capability of videotaping programs it is virtually impossible for educators to utilize this powerful medium.

Television is indeed a miracle that Americans must learn to manage.

2. *Television and learning.*—The National Parent Teacher Association has charged that schools are doing nothing to teach critical analysis of television viewing. The Association believes that television analysis should be taught in much the same manner as analysis of print literature.

Control of this dominant force may be accomplished if educators utilize television to enhance learning. The power of television can become a tool for the enlightened educator.

Control of television can be approached when students study television in school as a mirror of both reality and unreality; evaluating its messages and utilizing its power to enhance their life.

3. *Videotaping for instruction.*—Teachers can implement structured learning experiences to assist young people in their study of television only if television programs are videotaped off-the-air for delayed playback in face-to-face teaching situations.

Videotaping capability has been readily available to public education since the early 1960's. The introduction of the videocassette technology in 1971–72 totally revolutionized the viedotape medium—especially in education. Videocassette recorders (VTR) with tuners are television receivers capable of recording and playing back television programs.

Picture quality and ease of operation makes the videocassette technology the most effective medium for transmitting visual and sound images to students.

During the last ten years non-profit educational institutions have been utilizing videotape recorders to tape television programs.

4. *Home videotape recorders.*—In 1976, the Sony Corporation introduced a one-half inch format videocassette recorder for use in homes for recording television programs for delayed playback. Several Japanese and United States television distributors are now distributing home videocassette recording units.

RCA has invested over $200 million in promoting its new home VTR unit which sells for less than $1,000. RCA has predicted that within three years there will be a one billion dollar market for home videocassette recorders.

Videocassette recorders, with tuners, are approved for distribution by the Federal Communications Commission. The FCC recognizes that these recorders are television receivers and must meet Commission guidelines.

Videocassette recorders are readily accessible in thousands of educational institutions, and are now in the possession of literally thousands of American citizens. Millions of Americans will own videocassette recorders in just a few years.

5. *Regulation of broadcast television in the public interest.*—The Radio Act of 1927 established the Federal Radio Commission, allowing the Commission broad powers to classify stations, assign frequencies and otherwise regulate broadcasting. The Commission was required to grant licenses only "if public convenience, interest and necessity will be served thereby."

When the Federal Communications Commission was created July 1, 1934, the powers of the Radio Commission were carried forward, becoming the basis for eventually regulating and licensing television stations.

6. *Television industry—monopoly of the airways.*—"Broadcasting Magazine" reported a record pre-tax profit for the television industry once again in 1977.

In fact, 1977 was the biggest year by far for the television industry. Network profits in 1977 zoomed to $406 million, up 37.4 percent over 1976.

As staggering as the 1977 profit margin is, 1976 profits showed a profit growth of 41.8 percent over 1975.

The television industry in 1977 had profits totaling 1.4 billion dollars, up a startling 12.1 percent over 1976.

Rising income and profits for the industry have occurred during a period when the videocassette technology, introduced in 1971 ,was being integrated into public education.

Education and/or public broadcasting stations are, or course, funded by a combination of federal, state, and local tax dollars as well as tax deductible donations and grants from private institutions and individuals. Citizens, whether or not they view television programs, have paid for the programming through purchases in the market-place and taxes paid the government.

The evolution of television broadcasting has resulted in a monopoly of the airwaves by as few as three or four television stations in the typical United States market. In other words, three or four stations statistically divide up the advertising revenues for the market. Evidence exists that they divide the revenue almost equally in most markets. Advertising revenues which form the basis of television stations and network profits are the result of monopoly rights for which stations and networks pay nothing.

Realizing that the Federal Communications Commission grants and renews licenses on the conditions that broadcast stations serve "public interest, convenience and necessity," it seems only appropriate that schools be allowed to utilize television technology and programs in a meaningful capacity to promote the general welfare.

The airways, of course, belong to everyone.

7. *Television and the first amendment.*—The basis for the 1927 Radio Act can be found in the First Amendment to the United States Constitution:

"Congress shall make no law restricting an establishment of a religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people to assemble to petition the government for redress of grievances."

The essence of free education rests in the rights of teachers and students to have access and utilize information and knowledge. Efforts to prohibit, restrict, and limit free access to public information would be a direct violation of the Bill of Rights and the concept of "public interest, convenience and necessity." In other words, a violation of the concept of Fair Use as set forth in the new Copyright Law.

SECTION 2.—ANALYSIS OF PUBLIC LAW 94-553, SECTIONS 107, 108, AND 118 AND RELATED LEGAL CONCERNS PERTAINING TO OFF-AIR TAPING BY SCHOOLS

Purpose of the copyright law

The copyright law exists to serve the public through protecting creators of literary, aural and visual works against unauthorized uses of their creations. Without this protection the incentive to create would not exist; media creators would certainly not thrive and the public would be the loser.

Over the years the courts have allowed one exception to this exclusive right of copyright holders to prohibit copying. The exception, commonly referred to as "fair use" has now been written into the law.

Concept of fair use (Public Law 94-553, section 107)

School districts all across the country are citing Section 107 as the basis for their videotaping.

Consider the opening paragraph to Section 107.

"Notwithstanding the provisions of Section 106, the fair use of a copyrighted work, included such use by reproduction in copies or phonorecords or by any other means specified by that section, for the purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in a particular case is fair use the factors to be considered shall include—"

Careful reading of this opening paragraph indicates that schools are allowed to use duplicate copies of copyright material in the course of teaching. The intent of Congress is clear, that teaching and research should not be hampered by the necessity for obtaining permission for utilizing copyrighted material in face-to-face teaching.

The professional literature dealing with Fair Use has become more and more conservative in recent months. If there is any question, the literature indicates educators should not duplicate. If the law is ambiguous, do not copy. As a result of this conservative stance, most educators are now quite paranoid by even the prospect of a legal suit, yet the opening paragraph to Section 107 is clearly not conservative.

Factors for judging fair use

Following the introductory paragraph to Section 107, Congress listed four factors for judging Fair Use.

1. The purpose and character of use, including whether such use is of commercial nature or is for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted material as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The literature is very unclear and legal opinion is also in doubt as to whether it was the intent of Congress that each individual case of copying be evaluated on the basis of all four factors. It may be that Congress intended for every single duplicate copy of a copyright item be evaluated on the basis of these four factors. If that was the case, Congress should have placed a requirement in the opening paragraph—"In determining whether the use of a work in any particular case is a fair use the factors to be considered shall include—".

Note that the sentence implies that these four factors should be considered but that there may be other factors that should be considered in determining Fair Use. Congress did not indicate that all *four* of the factors had to be considered in evaluating every single case of copying copyrighted material.

The definition of the word "include" at the close of the opening paragraph also should be noted. In Section 101 (definitions), the law defines "including" as being "illustrative and not limitative."

Factor No. 1—The Purpose and Character of Use, Including Whether Such Use is of Commercial Nature or is for Non-Profit Educational Purposes

It is easy to see that videotaping of television programs by schools clearly falls within the intent of factor No. 1. Schools are non-profit educational agencies. The business of school is to educate the youth of America. Schools are supported by taxes and have been established to serve the public interest.

Factor No. 2—The Nature of the Copyright Work

The "nature" of the copyright work is extremely ambiguous. The House Report clearly indicates that the intent of Congress and of the Courts in listing this factor was to refer to whether or not the item to be copied was consumable, whether the item to be copied was readily available, and whether the item was designed originally for public exhibition.

Well it is obvious that television programs are consumable. However, television programs are repeated year after year. Programs never go away. Indeed, programs are readily available to home viewers and advertising is sold year after year, regardless of how many times a program has been repreated.

Considering the question of availability, television programs actually are not readily available for sale to schools. Some public affairs programs are for sale generally from six to nine months after their telecast date. Some feature films are available for sale or for lease but the vast majority of programs that appear on television are just not available for sale. There is no indication at the time the program is telecasted, nor can information regarding future sale be obtained even if the school telephones the networks.

Also related to the concept of "nature of a copyrighted work" is the issue of whether the original work was designed for public exhibition. Certainly television programs fall in the category of public exhibition; however, they are made available to people free in their homes. The basis of the television industry is formulated on the concept of selling advertising revenues to pay for the programs.

If homes can consume television free of charge, it seems only fair for the tax supported public institutions to have reasonable access to free television.

Factor No. 3—The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Materials as a Whole

The third factor in judging whether an item to be copied falls under fair use is a much more difficult concept to defend by someone wishing to use taped television programs. Generally, it is the intent of the teacher videotaping the program to show the entire program. It is impossible to anticipate a specific segment of a, program to videotape and use at a later date. In order to consider using a segment, a teacher would have to record the entire program and preview it carefully in order to determine what segment or segments to use in face-to-face teaching.

Copying television programs off-air is a matter of copying what is needed; whether the "amount needed" is an entire program or portion of a program is probably irrelevant to the issue of fair use.

Now this irrelevancy has not been proven in court but it is a point that should be considered by Congress and by the Justice Department in enforcing the fair use portion of the law. This is particularly true if the use of off-air television programs meets the other three criteria on the list.

While it would be highly unlikely that a student would want to copy an entire issue of Time Magazine, it is common practice for students to copy complete articles from Time and other magazines.

Is a magazine article really different than a TV program? If so, how is it different? Are there similarities between television programs and magazine articles? If so, what are the similarities?

A person who writes a magazine article indeed should be rewarded. Time Magazine has handsomely paid its contributors. Television networks program an 18-hour day. Each program has been paid for through advertising revenues ultimately paid for by the consuming public.

Factor No. 4—The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work

Legal opinions abound that this is the critical factor in determining whether or not a person may be charged with a civil violation of copyright. It would be difficult to prove wheher videotaping a segment of "Mork and Mindy" hurts the income of ABC or the affiliate station. Even if it does affect the value of the program or the potential market value of the program, this is not the fault of the school district that tapes the program but the fault of the producer who sells the program to ABC with the understanding that the program may be taped off-air by nonprofit educational institutions.

The television industry is financed through the sale of advertising revenue based upon ratings of programs. The ratings are based on the number of viewers watching a particular program. If the television industry can actually determine the number of viewers who tune in a program at home, the industry can certainly determine the number of schools that may videotape the television program. If networks can determine the number of viewers and the number of videotapings, the producer can charge the network an appropriate fee for telecasting the program. By charging the networks, the producer is reimbursed for his creative effort.

Networks should pay the bill for broadcast television. The consumer, in the end pays the producer by paying the television network and the station through the purchase of products advertised on television.

House Report 94-1476

Besides a thorough examination of the language of fair use, anyone wishing to develop guidelines for educators must review H.R. 94-1476 which became the official report explaining the rational of fair use.

The House Judiciary Committee Report 94-1476 indicated that elaborate guidelines for books and periodicals have been developed but such guidelines did not deal directly with television programs; however, the report does recognize that Fair Use does apply to taping broadcast television programs by non-profit educational institutions.

"The problem of off-the-air taping for non-profit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the Fair Use Doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests effected, and of the various legal problems presented. Nothing in Section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in the future in a future Congress. House Report 94-1476, Pages 71-72."

Airlie Conference, July 1977

As specified in the House Report, the Register of Copyrights conducted a conference on videotape recording for educational use on July 22, 1977, at Airlie, Virginia. Some 70 organizations were represented in small group discussions. In the conference's closing session, there was general recognition that Fair Use applies to off-air taping. The extent to which off-air taping applies and what procedures should be established on off-air taping needs to be determined in the future.

BOCES Case

The Board of Cooperative Educational Services, First Supervisory District in Lancaster, New York, has been sued by Time-Life Films, Encyclopedia Britannica Educational Corporation and Learning Corporation of America. These three firms have charged the BOCES School District with the violation of copyright for taping programs sold by these firms when they were telecast by the local ETV station.

Since the judge in the case issued an injunction in February, 1978, articles in the trade literature have circulated a great deal of misinformation.

The school district has taken a stand of not seeking publicity, whereas the plaintiffs in the case have gone out of their way to get as much publicity as possible, possibly to intimidate educators not to videotape television programs.

The situation in New York State is basically this—the judge has issued an injunction against further taping and distribution of 19 television programs, however, the BOCES District is still videotaping television programs off-the-air and distributing them as before. The injunction was not severe and the issue has not been settled.

New York State is divided into several regions, served by multi-county school districts. Virtually all of these districts videotape programs off-the-air in the same manner as the BOCES District in Buffalo.

The practice of off-air taping by educational agencies is quite common across the county. Quite often, however, the the taping is done in the cellar or in the quiet of the night because educators are fearful that they will be prosecuted. Indeed, it is sad that educators feel that they do not have access to broadcast television programs.

Public Law 94-553, Section 108, Library Off-Air Taping

Before leaving the actual documentation in the law, two additional sections deserve examination with regard to schools taping of broadcast television programs. Section 108 of the law deals with all phases of library copying.

In many ways it seems that Congress intentionally blurred the issue of off-air taping. In Section 108(f)(3) a library is permitted to make a copy of all or a portion of "audiovisual news programs" and to distribute by loan a limited number of copies provided that the loan does not have as its purpose any direct or indirect commercial advantage. The Conference Report defines "audiovisual news program" as local, regional or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events.

Does Section 108(f)(3) allow taping of news documentaries?

What is a documentary?

What is news?

What is news analysis?

Is news different fom news analysis?

Where do librarians and teachers get answers to these questions?

Commentators on Section 108 often discount item (f)(3) since they assume that the use of audiovisual news programs is limited to research. What is research? Who is doing the research? How is research, researched? Is research a school activity?

SECTION 3.—THE BROADCASTING INDUSTRY AND OFF-AIR TAPING

Earlier in Section 1, "Rationale Supporting Off-Air Taping", this paper explored several facets of broadcasting history and technology. The eventual guidelines for off-air taping by educational institutions should also reflect the nature of the financing and profits of commercial broadcasting, as well as the funding of public broadcasting.

Commercial broadcasting

It is common knowledge that commercial television networks base their programming decisions and advertising rates on ratings. This ratings system has proven satisfactory and is well accepted by broadcasters, advertisers, artists, producers, etc. Since off-air taping of broadcast television programs would slightly increase audiences, the off-air taping guidelines might require commercial broadcasters to charge advertisers a fee for this larger audience, or the broadcasters can be required to underwrite off-air taping as part of the proposed licensing fee being considered by Congress. Artists, producers and other creators of television programs can be justly compensated for their work by a new off-air taping ratings system. Certainly if ratings of viewers are accurate, the ratings of a few videocassette recorders operated by educators can be just as accurate. The use of ratings would eliminate any need for a national clearinghouse for royalties, etc.

Public broadcasting

The Corporation for Public Broadcasting was established by Congress to fund the production and distribution of educational television programs by combining federal, state, and local tax dollars with donations from private foundations and individuals. PBS programs, indeed all educational television programs, are telecasted solely with the support of tax money or tax exempt donations. Most programs telecasted by a local educational television station are not available for rerecording even for seven days.

The Corporation for Public Broadcasting has provided many grants for the production of television programs by its flagship stations. For instance, WGBH in Boston has been given federal funds for developing the Nova series for public broadcasting.

The Nova series, funded by federal tax dollars, has been copyrighted by WGBH in Boston. The WGBH does not allow any off-air taping of the Nova series. However, if a school district does tape the program off-the-air they may purchase rights to use the program at the rate of $162.50 per program. Other programs in the Nova series are sold through Time-Life Incorporated.

What may have been a classic abuse of copyright occurred when WNET in New York produced "The Adams Chronicles" for approximately six and a half million dollars of federal money and did not allow off-air taping of the series. The station then proceeded to sell the rights of the series to a commercial film vendor, Films, Incorporated. Thus, a series of historical programs, 13 programs in all, produced to celebrate the bicentennial was actually copyrighted by a locally tax supported public television station and sold to schools at a profit. School districts teaching American History were not allowed to videotape the program off-the-air and were forced to buy the program through a commercial film distributor.

The "Guidelines for Off-Air Taping" must allow educators appropriate access to television programs provided by both public broadcasting stations as well as commercial broadcasting stations.

SECTION 4.—FILM, VIDEOCASSETTE AND VIDEODISC SOFTWARE INDUSTRY AND OFF-AIR TAPING

To further complicate an already complex set of circumstances, the negotiating committee must consider the rapidly changing media software industry—

1. Within the past twelve months schools have been charged $750 to $2,000 for feature length motion pictures on either the 16mm film or ¾" u-matic videocassette formats.
2. Retail outlets have been selling feature length motion pictures on ½" VHS and BETA videocassette formats for $49 to $79 per feature.
3. Videodiscs of new motion pictures, e.g., "Jaws", have been sold through retail outlets in Atlanta for $15 to $20 per feature.

The educator/consumer must assume that everybody in the media software business is making a profit. The companies selling or leasing feature films on 16mm and ¾" videocassettes to schools appear to be making a substantial profit at the expense of the public interest.

A videocassette purchased for home use can be seen by as many viewers as a program purchased by a school district. Videocassettes purchased for loan by a public library will be seen by as many viewers as an identical program purchased by a school district. It is common practice for a public library to purchase a film collection for the use by the general public. As long as admission is not charged there is no restrictions on the number of showings, or the number of persons allowed to view the film.

Assuming that school or public library can purchase a videodisc of the movie "Jaws" for $20, how much should an educational institution be required to pay for using its own equipment and time to videotape "Jaws" off-air when it is telecasted for "profit" by a commercial television network or station?

The off-air taping guidelines negotiating committee must not only assess the nature of "fair use", but determine the amount of what is a fair return in the marketplace.

Media producers and distributors have raised the issue that if schools tape programs off-air, they will not buy the same program. The solution to this problem is seen in the following alternatives:

(1) Media producers may elect not to show programs on either public or commercial television stations.

(2) Media producers, negotiating telecasting agreements with local television stations and/or networks, might require appropriate compensation, based on off-air taping ratings, for those nonprofit educational agencies who may chose to tape programs. Compensation should be paid by the network/station which sells the advertising for the program.

CONCLUSION

Copyright, off-air taping and learning

Should non-profit educational agencies be allowed to tape programs off-the-air? The answer to the question seems obvious, considering the growth of the videocassette industry, the sale of the videocassette recorders to homes and the use of videocassette recorders in schools and colleges.

We are fast approaching the 1980 Presidential election, with some campaigning already underway. Schools and colleges should be getting ready to follow the 1980 Presidential Campaign utilizing television to allow students to study the candidates and the issues.

Television is the dominant medium of communication in the United States. Non-profit educational institutions must have access to broadcast television through the technology of off-air videotaping.

2

ASSOCIATION OF AMERICAN PUBLISHERS, INC. PRELIMINARY COMMENTS ON OFF-AIR VIDEOTAPING

Submitted in connection with the March 2, 1979 Conference on Off-Air Taping for Educational Purposes convened under the auspices of the Copyright Office and the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Judiciary Committee of the U.S. House of Representatives.

The Association of American Publishers (AAP) is the major national association for publishers of general books, textbooks and educational materials in the United States. Its more than 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. Many of these members are the owners and publishers of dramatic and non-dramatic literary works that are used in or are the basis for broadcast programs which are the object of possible off-air videotaping. In addition, AAP School Division members publish 85 percent of the books and educational materials used in elementary and secondary schools in America. Many of these School Division members participate directly in the audio-visual market selling videotape and other audio-visual materials for use in schools.

Because our members are directly and indirectly involved in this field and because many already have experienced some difficulty due to unauthorized off-air videotaping by schools, the AAP is very concerned about this issue. We recognize the complexities and the need for addressing the issues in a cooperative spirit; however, such cooperation should not be allowed to encroach upon the fundamental rights of the owners of copyright.

AAP has long been an advocate of the rights of owners of copyright and has seen in the print media tremendous infringement of these rights. We are therefore anxious to become involved at the early stages of these discussions in order to prevent infringement in the video medium as well.

In light of these interests we also respectfully request that we be considered as members of any committee that may be formed to further examine these matters.

Thank you for permitting us to file these comments in connection with this conference.

3

MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
New York, N.Y., March 5, 1979.

Re Videotaping off-the-air by educational institutions.

BRUCE LEHMAN, Esq.,
Counsel to Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. LEHMAN: Pursuant to your announcement at the conclusion of last Friday's conference on the above subject, we would respectfully suggest that the official record thereof should include the following:

The decisions in *Walt Disney Productions* v. *Alaska Television Network*, 310 F. Supp. 1073 (W.D.Wash. 1969), and *Encyclopaedia Britannica Educational Corporation* v. *Crooks*, 447 F.Supp. 243 (W.D.N.Y. 1978).

The order entered by the Court in the *Crooks* case, a copy of which is enclosed. We think it is particularly important that this order be entered in the record since it is not otherwise reported and will not otherwise be available to those concerned with this matter.

Thank you for your consideration.

Very truly yours,

JAMES BOURAS.

Enclosure.

U.S. DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

CIV-77-560

ENCYCLOPAEDIA BRITANNICA EDUCATIONAL CORPORATION, LEARNING CORPORATION OF AMERICA AND TIME-LIFE FILMS, INC., PLAINTIFFS.

C. N. CROOKS, JOSEPH S. PLESUR, WILLIAM MOORMAN, GEORGE MUELLER, RICHARD E. FORRESTEL, RICHARD M. PFEIFFER, FREDERIC SIEVENPIPER, JOHN STOVALL, THEODORE H. ERTEL, ALVIN J. KRAEBEL AND BOARD OF COOPERATIVE EDUCATIONAL SERVICES, FIRST SUPERVISORY DISTRICT, ERIE COUNTY, DEFENDANTS.

APPEARANCES: RAICHLE, BANNING, WEISS & HALPERN (R. WILLIAM STEPHENS, ESQ., OF COUNSEL) BUFFALO, NEW YORK, FOR PLAINTIFFS.

ELLIS, KUSTELL & MULLENHOFF (CARL B. KUSTELL, ESQ., OF COUNSEL) BUFFALO, NEW YORK, FOR DEFENDANTS.

This cause came up to be heard on the motion of the plaintiffs for preliminary injunctive relief, and the court having considered the complaint, answer, order to show cause and all of the affidavits, exhibits, and other papers filed in this case, and having heard Raichle, Banning, Weiss & Halpern (R. William Stephens, Esq., of Counsel) for the plaintiffs in support of the said motion, and Ellis, Kustell & Mullenhoff (Carl B. Kustell, Esq., of Counsel) in opposition thereto, and having issued a written decision finding the plaintiffs entitled to a preliminary injunction, and having considered both the oral and written suggestions of counsel as to the form of the injunction, it is hereby

Ordered, that the defendant BOCES is enjoined from videotaping off the public airways educational motion pictures or programs copyrighted by the plaintiffs pending a final decision in this case.

Copyrighted motion pictures or programs shall include but not be limited to the following titles:

"Bartleby," "My Old Man," "The Lady, or The Tiger," "The Crocodile," "The Lottery," "Dr. Heidegger's Experiment," "The Secret Sharer," "Walter Kerr On Theater," and "Opera With Henry Butler."

"Symphony Sound With Henry Lewis and the Royal Philharmonic," "Felipa: North of the Border," "Geronimo Jones," "Miguel: Up From Puerto Rico," "Siu Mei Wong: Who Shall I Be?," "Two Deserts: Sahara And Sonora," "Two Grasslands: Texas And Iran," "Two Mountainlands: Alps And Andes," "Ultimate Risk," and "Ultimate Machine (World We Live In)."

It is further

Ordered, that the defendant BOCES at its own risk may distribute to the school districts copies of the plaintiffs' films which have already been videotaped and are incorporated into the school curricula, provided that the following steps are taken to monitor the use of the films:

1. BOCES shall keep records of the number of copies made from each master tape, the date each copy was made, the name of the requesting school, the date the film was transferred to the school, the date it was returned, and the date it was erased.

2. Copies of master tapes shall be placed in the custody of a designated BOCES employee, who shall require the reciving school to sign a receipt for the film and to complete a form stating the number of times the film was shown, the date and time of each showing, the names of each teacher and the class to whom it was shown, and the number of students in each class who viewed the film.

3. Copies of the receipts and records referred to in ¶¶ 1–2 shall be filed with the court and with the plaintiffs' attorneys.

4. Each copy of a master tape shall be returned to BOCES within 30 days from the date the film was transferred to the school. Requesting schools shall be informed of this requirement in writing *no later than* the time the film is delivered. The designated employee referred to in ¶ 2 shall take responsibility for securing return of the film within the 30-day time limit. If any film is not returned within 45 days, this fact shall be reported immediately to the court and to the plaintiffs' attorneys.

5. Each copy shall be erased promptly after it is returned to BOCES.
6. The determination of whether a film has been incorporated into the school curricula shall be made by BOCES.
7. A copy of this order shall be distributed to all of the participating schools within BOCES' district.

The purpose of these provisions for monitoring the use of the films is to establish records which will enable the plaintiffs to measure their damages should they ultimately prevail in this action while at the same time preventing the disruption of existing services provided by BOCES to the schools.

Notwithstanding any provision in this order, the defendant BOCES is authorized to enter into licensing agreements with the plaintiffs for the use of their films.

So ordered.

JOHN T. CURTIS,
U.S. District Judge.

Dated: March 29, 1978.

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PRINCE GEORGE'S COMMUNITY COLLEGE,
March 14, 1979.

Mr. BRUCE LEHMAN,
House Committee on the Judiciary, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn Office Building, Washington, D.C.

DEAR MR. LEHMAN: I would like to comment of the "fair use" of off-the-air recordings of broadcast programs.

In your committees' deliberations, I hope you will keep in mind the needs of educators, especially those of us concerned with teaching courses relating to the broadcast media.

I teach courses in Television Production and Mass Media. In both these courses I have found that the use of off-the-air materials is invaluable. I have used video-tapes of broadcast programs to illustrate themes in contemporary programming, television's presentation of the news, approaches used by television advertiser's, and to demonstrate various techniques of production. The use of video-tapes allows contemporary material to be presented vividly.

I hope the decisions your committee reach will allow me and other teachers to continue to make use of off-the-recordings as a teaching devise.

Sincerely,

MARTIN BURKE,
Associate Professor, Speech Communication and Theatre.

5

THE EVERGREEN STATE COLLEGE,
March 14, 1979.

Mr. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts
Rayburn House Office Building,
Washington, D.C.

DEAR MR. KASTENMEIER: As an educator and an administrator I am very concerned about the availability of teaching materials. The new Copyright Act has had a direct impact on the way we are able to provide materials for students' use in the classroom. We are particularly concerned about the lack of definition or guidelines in the use of off-the-air television programs. We know we must support the rights of the producers in order to maintain the quality of their production. We also know that these materials have valuable applications in our classrooms when they are broadcast. Therefore, I support the concept and definition of fair use as follows: "Fair Use" for recording off-the-air programs extends 30 days from the time a program is broadcast and, further, extends until the program is available for purchase, lease, rental or licensing."

It seems to me that if such a definition were in effect, it would remove the barriers for immediate use in the classroom and provide us the opportunity to evaluate those materials for purchase. The most effective evaluation comes about when teachers, working with students, have an opportunity to react to the materials to see if they meet the learning needs.

Thank you for the opportunity to comment on this very important matter.

Sincerely,

DAVID J. CARNAHAN,
Associate Dean of Library Services.

6

CONSORTIUM OF UNIVERSITY FILM CENTERS,
Champaign, Ill.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Rayburn Building, Washington, D.C.
(Attention of Mr. Bruce Lehman.)

The Consortium of Univesity Film Centers is an organization of 52 active members which are public and private universities in the United States renting educational films. In addition, the Consortium of University Film Centers has 22 associate and 40 sustaining members all of whom have interest in enhancing the access of films within the educational system of the nation.

The film collections of the active members of the Consortium of University Film Centers contain more than 35,000 different educational films, and in excess of 250,000 individual film prints. These films are used in elementary, junior and senior high schools, colleges and universities, and by a wide variety of agencies and organizations involved in meeting the continuing education needs of the nation. Last year, these universities circulated more than 1,000,000 films for classroom use.

The Consortium of University Film Centers members charge their customers a use fee designed to recover the costs of circulating the films. Thus, while the primary role at the film rental libraries is to meet the educational needs within their university, their state, and with their rental customers, the CUFC members also recognize the economic realities involved in film distribution. In fact, a number of the member institutions not only rent their films, but also act as the distributors for films produced within their own institution and by other public agencies. Thus, these institutions are both major users, and small distributors of educational programs, many of which are broadcast on television.

Since the time that documentary and educationally valuable television programs were first made available for educational use following broadcast, the university film collections have been major resources for the accessing of these programs. Major series such as "Civilization" and "Age of Uncertainty" as well as outstanding individual programs such as "Hunger in America; Mystery at Stonehenge;" "This Child is Rate X;" and "Black History, Lost, Strayed, or Stolen" are available from many of the CUFC member film collections. When practical, some of these programs have actually been available at the time of broadcast or shortly after the original air date.

The experience of the past 20 years of distributing television produced films has shown that the educational life of these programs continues long after the original broadcast.

The off-air taping of television programs has the potential of being a valuable new tool for educators in the United States. Many important teaching moments are currently lost because a program may be so timely that it will never be released for classroom use. Often even those programs which are released are not available for several months after the initial interest in the program has been evidenced. Off-air taping can overcome these boundaries of time and space by providing immediate access to important educational materials broadcast on television.

However, the CUFC members urge the committee to carefully attend to the impact that the guidelines for off-air taping will have on the long range availability of important television programs. The guidelines which will eventually emerge from these deliberations must take into account the need to continue to broaden the availability of educational materials. The guidelines should not be so broad as to destroy the market for distribution of television programs other than by off-air-taping.

The guidelines should not lose sight of the fact that there are times when 16mm films can meet an educational need which television cannot meet. If the off-air taping guidelines are so broad as to make 16mm film distribution no longer economically possible, a large source of educational materials will be narrowed to only those applications where television playback is possible.

The CUFC would like to take this opportunity to suggest, regardless of the final definition of fair use regarding off-air taping which the committee develops, that one limitation would be included. If the television program is already in film or video tape/video disc distribution to education, off-air taping could not be considered fair use under any circumstances. This could provide educators with access to things not available and, at the same time, encourage the producers to make their materials available coincidental with the original broadcast.

The CUFC is prepared as an organization to meet with the ad hoc committee or any other group to provide any additional information which we have. We are committed to the most effective use of educational materials possible. This means the maximum of access at the lowest possible cost without destroying the economic interests of those involved in the production of the materials.

CHARLES HUNGER,
President.
RUTH RAINES,
Executive Director.
ROBERT L. ALLEN,
Board of Directors.

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TRAINING MEDIA DISTRIBUTORS ASSOCIATION,
Los Angeles, Calif., March 12, 1979.

Representative ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberty and the Administration of Justice, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: In accord with the request made at the March 2 meeting called to discuss guidelines for off-the-air taping for educational uses, we are pleased to submit the enclosed Position Paper on this subject prepared by Training Media Distributors Association.

We feel that this issue is of vital importance to the continued health and growth of our industry which is composed primarily of small business people, and are therefore anxious to cooperate with you in any way possible to fully explore this serious issue.

Sincerely yours,

JACK L. COPELAND,
President.

Enclosure.

POSITION STATEMENT OF THE TRAINING MEDIA DISTRIBUTORS ASSOCIATION REGARDING UNAUTHORIZED "FAIR USE" COPYING OF TELEVISION BROADCASTS BY EDUCATIONAL INSTITUTIONS

The Training Media Distributors Association (TMDA) represents organizations well-known for the production and distribution of motion pictures, videocassettes and filmstrips designed for training and educational purposes. These programs are used by schools, colleges, universities, religious organizations, hospitals, government agencies, businesses and industry. Subject matter ranges from data processing, health care, police sciences, and food service to sales training, business procedures, management development, and adult education.

The several thousand programs of TMDA members have been significantly involved in the training and education of hundreds of millions of people for numerous occupations and avocations throughout the world. The high creative level of these audiovisual materials has been recognized by educators, trainers, government officials, scientists, and businessmen, and film festival juries in every major nation. They have proven to be uniquely cost-effective and efficient educational tools.

Although mostly small business organizations, TMDA members have made a major contribution to our society and should be encouraged to make a continuing contribution in the future. TMDA members, thus, view so-called "fair use" unauthorized copying of television broadcasts as a major erosion of badly-needed protection under the Copyright Law of 1976, as a serious threat to their businesses, and as an encouragement to wide-spread piracy.

The position of the Training Media Distributors Association on unauthorized "fair use" video copying of television broadcast stems from the following considerations:

1. Most training media distributors have sold, rented, or otherwise licensed their audio-visual products to educational institutions for instructional purposes for many years. This and other forms of private non-theatrical use constitute the major sources of income of these distributors.

2. The "fair use" concept does not arise out of any need of educators for instructional materials from training and educational media producers which cannot be currently provided by traditional sale, rental, and licensing programs offered to educational institutions at reasonable prices.

3. Although television broadcasting of the programs of training media companies may serve the public interests, unauthorized "fair use" copying would make it virtually impossible for them to license their programs for telecasting.

4. "Fair use" off-the-air copying permits the unregulated proliferation of unauthorized copies, creating an environment in which piracy will be rampant. There is no effective way to control the use of this material either within or outside of educational institutions.

5. The arguments of educators proclaiming the desirability of "fair use" off-the-air videotaping have largely referred to "television networks." This is misleading and meant to create the impression that the educators' opponents are solely corporate giants with no intesest in the nation's classrooms. Nothing could be farther from the truth. Those most likely to suffer from unauthorized off-the-air taping are training and educational media producer/distributors who deal in instructional materials that have clear-cut application and immediate value in the classroom.

6. Most training media distributors, although highly creative and contributive to society, are small business organizations, many of them doing less than $1,000,000 in sales. As copyright owners, they and the materials they produce deserve a special protective status, rather than exposure to unauthorized "fair use" off-the-air copying.

7. Unauthorized "fair use" copying could effectively deny to training media producers the protection of both civil and criminal provisions of the copyright law. At the present time, according to the F.B.I., there is virtually no criminal protection afforded copyright owners against pirates in the educational community. Unauthorized "fair use" copying could effectively destroy the civil protection as well.

8. The argument made by some educators that unauthorized "fair use" off-the-air copying is merely recognition of new technological advances and the fact that copying is "easy" is specious and dangerous. "Ease" does not justify piracy any more than it does counterfeiting or theft in a self-service store.

9. Even before the "fair use" question has been resolved by Congress, certain educators are already encouraging their colleagues to "claim 'fair use'" when they do not wish to negotiate licenses for materials they want to copy. The "fair use" concept thus contributes to an abusive, lawless attitude toward copyright owners.

10. The concept of unauthorized "fair use" off-the-air videotaping offers the risk of quickly degenerating from off-the-air copying to simply coping anything at hand. This tendencey already exists to an alarming degree.

11. The goal of some "fair use" advocates is to use unauthorized copying, both on-the-air and otherwise, as a means of financing educational programs at the involuntary expense of media producers.

The creative role performed by members of TMDA stands in disproportionate significance to the typically small size of their organizations. The programs they offer have proven themselves to be of great value to those educational institutions which have bought, rented, or licensed them. They may also have great value for a much wider audience. TMDA members thus feel that they should be able to license their programs for television broadcasting without fearing the exploitation which would accompany unauthorized "fair use" off-the-air taping.

The copyright laws were designed to protect the creative resources of the nation so that the widest range of ideas and possibilities would be available to copyright users—private individuals as well as educational institutions—at reasonable costs. This goal has been realized—in the case of most training and instructional materials—at the sole risk of TMDA member organizations and other media producers, without the risk of public funds. If this condition is to continue into the future, all private media producer/distributors must be protected against unauthorized "fair use" off-the-air taping and other concepts which erode copyright protection.

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OSHKOSH AREA SCHOOL DISTRICT,
Oshkosh, Wis., February 12, 1979.

MR. BRUCE LEHMAN,
c/o the Honorable Robert W. Kastenmeier, Cannon House Office Building, New Jersey and Independence Avenues, Washington, D.C.

DEAR MR. LEHMAN: As professional staff members responsible for facilitating the use of video as an educational tool, we are constantly reminded of the restrictive nature of copyright guidelines in the area of network programming.

We are duly appreciative of the right of the producer and sponsor to reap the profits of their creative endeavor. It is our feeling, however, that an off-the-air videotaping policy needs to be responsive to the needs of our young people and to the intent of the Constitution and 1976 Copyright Act.

We urge, therefore, your careful consideration of the Copyright Law Resolution: Videotaping Television Programming (A Working Paper) adopted by the Association for Educational Communication and Technology, April 21, 1978. Of particular importance is a need for longer maintenance of copies, e.g., one year, and a fair and equitable license fee structure for retention beyond this time.

Sincerely,

MARJORIE DOERING,
GARTH SPEES,
JAMES ZITZELSBERGER,
Media Specialists, Oshkosh West High School.

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EASTERN WASHINGTON UNIVERSITY,
Cheney, Wash., March 15, 1979.

Representative ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Committee of the Judiciary, House of Representatives, Rayburn Building, Washington, D.C.

DEAR REPRESENTATIVE KASTENMEIER: This letter is in reference to the Copyright Conference of March 2, 1979.

As chairman of the Media Service Program Officers Council in Higher Education for the State of Washington, I wish to comment on the issue of off-air copying of television programs for educational use.

Our group is concerned about the present restrictions as we are not able to provide a valuable learning tool for the faculty of our institutions. There are forums, documentaries, news commentaries, etc. which provide up-to-date information not otherwise available to our students during normal classroom sessions.

I am sure you have heard all the arguments as to why the law stands as it does.

Our group feels a more equitable approach for both the producer and educator is a two semester retention time for all television programs. These programs to be used for educational purposes within the physical facilities of the institution. This would allow the faculty member to view the program and decide at what point in time during the semester he/she could best utilize the program.

Many thanks for your interest in this matter.

Sincerely,

JEROME S. DONEN,
Chairman, Media Service Program Officers.

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ROBERT I. FREEDMAN,
ATTORNEY AT LAW,
New York, N.Y., March 7, 1979.

BRUCE LEHMAN, Esq.
Counsel, Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

IVAN BENDER, Esq.
Consultant, Copyright Office, Library of Congress, Washington, D.C.

DEAR BRUCE AND IVAN: I wish to express my gratitude for permitting me to participate in the conference for off-air taping for educational purposes. I believe the points of view of the presenters were clearly and concisely made and the information exchanged was useful.

Unfortunately, the party suffering the greatest injury due to off-air taping, the independent television producer, was not represented directly in any reasonable proportion to his interest. Producers for public television such as Children's Television Workshop, Learning In Focus, Science Program Group, The Great Amwell Company and others had no spokesperson. Commercial producers such as David Wolper, Norman Lear and others, likewise were not represented. Yet these entities are the copyright holders of the vast majority of programs being recorded off-air and used in classrooms.

I am therefore constrained to submit the enclosed comments for the record as counsel to several independent producers (LIF, SPGI, The Great Amwell Company) and counsel to the Association for Independent Video and Filmakers. The comments are my own, but they arise out of my involvement with my clients' concerns.

I thank you for your consideration of these comments.

Sincerely yours,

ROBERT I. FREEDMAN.

STATEMENT OF ROBERT I. FREEDMAN, ESQ.

The issue of off-the-air videorecording of televised programming by nonprofit educational users is an issue of grave concern to independent producers. As was indicated by network representatives at the conference of March 2, 1979, the vast majority of non-news programs are furnished to the commercial networks by independent producers. This includes almost all network prime-time programming. Independent producers are also furnishing substantial programming to public television, and under the Public Telecommunications Financing Act of 1978, independent producers will be furnishing even more public television programming. These individuals and entities are the copyright holders of most of the programs recorded off-the-air by teachers for use in the classroom, and their concerns should be of extreme importance in the consideration of this issue.

The independent producer in public television depends heavily upon royalties from educational market sales and rentals to sustain his creativity. Very often the independent producer sees no revenues during periods of research and development of new program ideas. Unlike public television station producers, the independent producer has no subscriber base to sustain periods between production. All too often production grants cover only periods of production, and thus the independent producer must look to other markets to sustain and nourish those periods of creativity between productions.

In many instances a successful public television production and presentation will generate substantial demand by the educational community for acquisition of program materials. The independent producer often licenses educational distributors to represent his programs to the educational market. These distributors then pay royalties to the independent producer. The trade association of such distributors, The Association of Media Producers, has expressed its views on this issue at the conference.

Often the independent producer must share its royalties with writers, performers, copyright holders of literary, music or choreographic works, and even nonprofit program funders (such as the National Endowment for the Humanities and the Corporation for Public Broadcasting). Those revenues which remain after such sharing are often all that stands between the independent producer and his creditors until such time as the producer receives another grant.

It is therefore imperative that any definition of Fair Use and resulting licensing mechanisms do not cut off the life's blood of these producers. Independent productions in public television are as diverse and vital as "The American Short Story," "Documentaries of Frederic Wiseman" and many award-winning independent films and video works. In much the same way that book authors live off royalties from a completed book while writing their next work, audio-visual authors depend upon these royalties as a major source of their income. These royalties go to the heart of the creative incentive which is given protection by the copyright laws.

It is a fact of life that network license fees in commercial television barely cover production costs. Thus, although the program producer may cover expenses on a network sale, he must look to ancillary markets for his profit incentive. These ancillary markets include off-network syndication, foreign sales, merchandising and, in some cases, educational market exploitation.

Although the commercial television producer is rarely as dependent upon educational market royalties as his public television counterpart, educational audiovisual fees from series such as "Roots" and "Holocaust" be can substantial. They reward successful commercial creativity while furnishing support for further creative works.

Independent creative producers are a concerned group of persons and entities who seek to entertain, educate and at times inspire their audiences. Their goal is the broadest possible access to their programming, coupled with just compensation for use of their works. I am confident that regulations which foster these dual interests would well serve both owners and users of copyrighted audio-visual works.

Respectfully submitted,

ROBERT I. FREEDMAN.

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OFF-AIR VIDEOTAPING: AN EDUCATIONAL SOLUTION WITH LEGAL PROBLEMS

BACKGROUND

The use of television programs in the classroom is an obvious and sensible application of technology to enhance and extend the educational process. Unfortunately, many valuable programs are aired at times when schools are closed or students are scheduled for other educational activities. The technological solution is to videotape these programs for later use in classroom instruction, but videotaping may or may not involve illegal use of copyrighted materials. The technology is available to many educators, and a copyright law is in effect which points the way but does not explicitly answer all the questions. Meanwhile, media professionals are caught between requests from teachers for off-air taping of television programs and prohibitions from media producers that off-air taping is a violation of their rights. With students and their highest welfare as a first consideration, this document is intended to point the way toward a more satisfactory solution to the use of television programming in schools.

During the last decade, thousands of videotape recorders were sold to schools and colleges. These machines held tremendous potential through their ability to preserve shows on commercial television for nonprofit use in classrooms. The idea caught on fast (the programming was very useful) and millions of dollars have been spent to provide experiences that have great and far-reaching social value for students everywhere. The use of TV programs to help educate seems natural, because video experiences available on network and public television greatly extend the limits of the classroom.

In 1976, a new copyright law was enacted. Due to the complexity of the issues and the multitude of interested parties, not all copyright problems were resolved, but the legislators did codify in the law the already judicially established criteria of fair use. Fair use is a right of teachers and students, among others, to reproduce copyrighted works under certain circumstances. The law says that "In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
4. The effect of the use upon the potential market for or value of the copyrighted work."

In other words, the areas of concern in determining fair use are:

1. The intended use of the copies;
2. The type of material to be copied;
3. The size of the portion of the item to be copied; and
4. The potential negative effect of the copies on the copyright owner's right to monetary profit.

The law expressly grants teachers and students fair use of copyrighted works without permission of the copyright owner for nonprofit classroom use. In general, it was left to future agreements among interested parties to formulate rules as to exactly how much of what items could be copied, and to negotiate the most important fair use consideration: negative effect or profit vs. educational priorities. As a result of efforts to balance the rights of copyright owners with the needs of the educational community, mutually acceptable guidelines to fair use copying were subsequently developed in many areas. In regard to off-air videotaping, legislators recognized the inadequacies of the new law, and it was anticipated that future clarification of the issues would follow compromise between educators and copyright owners. However, consistent and lasting solutions have not been negotiated in regard to the application of fair use criteria to off-air taping.

In addition to concern over the legitimate rights of teachers and students, an important concern is the right of copyright owners to remuneration from the sale or lease of their works. Maintaining the incentive to produce creative works is an important objective of the copyright law. Certainly, it is in the best interests of students and teachers that programs of educational value continue to be produced. A workable compromise must be found which balances the rights and needs of the copyright owners with the rights and needs of educators and students.

At present, teachers and media professionals are often confounded with conflicting demands and legal opinions on the subject of off-air videotaping. Media professionals and administrative school employees are being asked to function as attorneys, when even attorneys themselves cannot agree as to what is correct. In reviewing the same circumstance involving off-air videotaping, one attorney will give one opinion, and another equally credible attorney will provide an opposing opinion. The media producers would deny all right to videotape commercially produced television programs, while many teachers are urgently pressing for off-air recordings to enhance their classroom activities. Educators are caught in the moral dilemma of interpreting and following the obligation to use copyrighted material in a proper and legal manner and the professional imperative to bring the most effective learning experiences to their students. Media educators deal with problems of copyright and off-air taping daily. They need concrete guidelines upon which to make decisions.

The goal of the following proposals is to recommend a solution that has as its primary focus the best educational opportunity as well as recognize the inherent right of the producers and distributors of educational and commercial television programs to appropriate remuneration for their creative efforts.

AGREEMENTS ON OFF-AIR TAPING

Currently acceptable practices in the area of off-air videotaping are primarily confined to programs produced or distributed by the following non-commercial agencies: Great Plains National Instructional Television Library, Public Television Library, Agency for Instructional Television, and Public Broadcasting Service (PBS cannot authorize school recordings for all its programs and periodically issues lists of affected programs). Videotapes of public and instructional television programs are subject to the following conditions:

1. Copies may be made only by students or staff in a nonprofit educational institution;
2. Copies may be used only for classroom instruction or related educational activities in classrooms, auditoriums or laboratory exhibitions;
3. Copies may be used only in the educational institution for which made;
4. Copies must be erased or destroyed at the end of the seven day period of local ETV and other educational broadcast licensed by the distribution agency, unless authorization to retain the tape is specifically made in writing in advance by the distribution agency.

Commercial broadcasters have not developed a policy permitting off-air videotaping for educational uses, except in the case of news programs. Libraries in publicly supported schools and private nonprofit schools whose collections are available to outside researchers may videotape and indefinitely retain copies for non-commercial use of the following types of programs: local, regional, or network newcasts, interviews concerning current news events, and on-the-spot coverage of news events.

Permission has not been granted for videotaping most documentary programs or magazine format and other public affairs broadcasts. In cases involving those programs and other non-news programs, the educator who wishes to tape off-air must carefully consider the copyright law's four fair use criteria. This is an especially difficult task in view of the polarized positions taken by organizations representing media producers and distributors on the one hand and those representing educators and librarians on the other. In an effort to balance the needs of the student with the rights of creators and distributors of television programs, the following guidelines are proposed.

CMLEA POSITION AND GUIDELINES FOR FAIR USE COPYING OF COMMERCIAL BROADCASTS

The following guidelines are intended for students, teachers, and staff of publicly supported or nonprofit educational institutions. The guidelines are intended to answer the problem of obtaining advance permission to copy and to address the need for preview copies for future acquisition or rental. They are also intended to reinforce the inherent right of producers and distributors to remuneration for their creative efforts.

Off-air videotapes of complete programs may be made and retained subject to the following restrictions:

1. Videotapes for preview purposes must be erased within one week unless an extension of the preview period is approved by the copyright holder. If the original broadcast includes notice that the material is available for sale, rental, or lease, the tape must be considered a preview copy.
2. If the material is not obviously available for sale, rental, or lease, the videotape may be retained during the school year in which the tape was made. However, within a week of the original taping, a letter must be written to the copyright owner or network requesting information as to sale, rental, or lease of the material. The tape must be immediately destroyed in the event of receipt of formal notice from the copyright owner of the material's commercial availability to the educational institution.
3. Off-air videotaping may be performed only as a result of an individual teacher's request (Media professionals are included in the definition of teacher). Programs may not be systematically copied in anticipation of requests.
4. The person making a request must sign a statement of responsibility.
5. Control persons must be designated at each campus or other videotaping site to monitor requests and maintain the integrity of the policy.
6. Records must be kept of the title of each program copied, the date of the videotaping, and the date of the erasure.
7. No duplicate copies should be made.
8. Videotapes should be used only in the course of face-to-face instruction in single classes.
9. Videotapes should be used only at the site for which the original teacher request was made.
10. The educators involved in off-air videotaping must endeavor to make themselves fully knowledgeable regarding the copyright law and related judicial decisions, especially in the areas of fair-use and off-air videotaping.

COMPENSATION FOR COPYRIGHT OWNERS

Many programs of educational value are already financed either through direct grants of public monies or through federal tax credits granted to businesses for program sponsorship. Since compensation from federal funds has been made to these producers, CMLEA endorses the concept that these programs fall within the public domain, and as such may be reproduced under the provisions of section 105 of the copyright law.

Although we feel that our guidelines are allowable under the right of fair use, we realize that commercially sponsored producers will remain concerned over the problem of proper remuneration for their creative efforts. Therefore, we wish to advocate the consideration and congressional enactment to a tax benefit to producers and networks who will explicitly grant to educational institutions the right to videotape their programs for classroom use. The diverse nature of the authorship, production, and distribution of programs broadcast over television channels makes the problem of remuneration for copying privileges very complex. It is difficult for educators to locate all the parties involved in a film or other program, and it is difficult for the copyright owners to unanimously agree on permission to copy and on allocation of any copying fees. As an answer to these problems, we strongly endorse a public service tax concept because of the benefits which would accrue to the producers and networks as well as to the schools.

The public service concept would allow producers and networks a limited amount of tax write-off in exchange for the schools' rights to videotape their programs. Arrangements would be made at the time a network contracts with a producer concerning a program to be aired on a future date. Attorneys would at that time have to work out how the money from the write-off would be distributed among the various interests in that particular copyright (i.e., how much to the screenwriter, the musicians, actors, etc.). A tax law expert has indicated that the write-off allowable to networks might consist of a specially designated tax credit. It could be based on a figure such as 2 percent of the original cost of the program to the network. Producers could be given a similar credit or could contract for payment from the network in return for public services rendered. The special tax credit would be allowed over and above presently allowable deductions (which range above the 70 percent level), against procuring a film for TV during the first year of usage. Such a solution would require a minimum of red tape for both copyright owners and educators. It would reward producers and networks for originating and airing programs of educational and artistic worth. Students would benefit from easier access to television programs. Educators would benefit from an agreeable resolution of the conflict of producers' rights versus students' rights.

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New York, N.Y., March 6, 1979.

Re conference on off-air taping for educational uses.

Bruce Lehman, Esq.,
Counsel to Subcommittee on Courts, Civil Liberties and the Administration of Justice, Congress of the United States, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Bruce: We were encouraged by both the substance and tone of last Friday's conference, and I am sure you were pleased with the large and active turn-out.

We look forward to either a direct or indirect continued participation in the resolution of these issues, and hope that our position significantly advanced the mood to reach an industry-wide consensus.

Again, our appreciation for including our presentation on the agenda.

Very truly yours,

Robert N. Gold.

WNET's Statement To Be Delivered on March 2, 1979 at a Meeting of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice

Mr. Chairman, and members of the Committee, I am Robert Gold, General Counsel of WNET. I am also speaking today on behalf of Boston's WGBH and KCET which is located in Los Angeles. Both of these prominent public television stations have endorsed our remarks. WNET is a noncommercial, community owned public television station licensed to Newark, New Jersey and serving its 300,000 contributing members and millions of other viewers in the tri-state New York City area. We appreciate the recognition by this Committee and the Copyright Office that stations like WNET, WGBH and KCET, which produce and supply programs broadcast by the more than 270 PBS stations, might provide a special perspective to these proceedings. The public broadcasting system's strength is in part derived from the diversity of its programming sources and the autonomy of local station managements. Although no one station can adequately represent the interests of all PBS members, we do hope that our brief remarks will reflect the positions of many of the other major producing stations who could not be in attendance.

We do not, however, speak solely from the vantage point of a producer of nationally distributed programs, although we are a principal provider of prime-time PBS programs, such as the widely acclaimed "Great Performances" series, "The Adams Chronicles," "Bill Moyer's Journal" and the heralded indepth news program, "The MacNeil/Lehrer Report," which is co-produced with WETA and originates nightly from studios in both New York and Washington.

We also speak today as a community-based educational station with over 17 years of experience in providing instructional programs to local schools through our School Television Service. This past year close to 40% of WNET's total broadcast week was devoted to childern's programming, including 35 hours each week of in-school classroom courses which reached approximately 650,000 students in 1,700 schools. Our school service broadcast programs were produced or distributed by many organizations represented at this meeting. WNET's staff conducted numerous seminars and workshops, attended by some of the 9,000 teachers who participate in this service and we also published manuals to assist teachers in course selection and scheduling. In addition, WNET's Office of Higher and Continuing Education is producing and broadcasting courses for college credit by adult non-traditional students who share their learning experiences in regular sessions held at local centers staffed by college instructors.

WNET therefore has a dual mandate: to produce innovative and stimulating cultural, public affairs and entertainment programs for its general audience; and to maintain and expand its direct classroom service to our viewers and colleagues in the educational community.

In striving to fulfill this dual mandate, we have examined the thorny issues which are involved in the school off-air taping controversy and have wrestled with the following basic policy question: As a national producer, with program funding always in short supply and production expenses ever-rising, should we seek to maximize our ancillary income by withholding off-air taping rights, or do we have a superior obligation to enable students to view our programs for a limited time in classroom settings without financial benefit to us and even at the risk of reducing our eventual income?

WNET has determined that despite the financial consequences,[1] we should permit the school community to enjoy certain rights in our programs. As the recent Carnegie Commission stated: "We believe it is time to launch new efforts to tap the power of broadcasting . . . for learning. . . . The issue is not whether public broadcasting has a responsibility in education, but how best to carry out that responsibility".[2] WNET looks to the establishment of fair industry-wide school off-air taping guidelines as a small first step in meeting this responsibility.

Accordingly, we have concluded that these issues can most effectively be resolved through the proposed Ad Hoc Committee which is to be convened subsequent to this meeting.

Our initial suggestion to this committee would be to expand the traditionla definition of fair use and to use a fresh approach in seeking a consensus. The doctrine of fair use has been called both "obscure"[3] and "the most troublesome in the whole law of copyright"[4] and no court, to our knowledge, has previously ruled that reproduction of an entire audiovisual work—even by a school—should be condoned. Section 107 of the new Copyright Act merely codified the previous leading judicial decisions. Therefore, since the new committee will be establishing guidelines which may authorize limited copying of entire works by schools without permission of the copyright owner, we believe that a limited departure from the conventional fair use concept is essential.[5]

Secondly, we would embrace the right of teachers at non-profit educational institutions to spontaneously tape entire programs off air for classroom use during a seven-day period without a fee and without the copyright owner's permission. We recognize, as did those who participated in the 1977 Airlie conference, that the seven-day period neither completely satisfies the schools—who claim they need more time to fit currently broadcast programs into future curriculum schedules—nor satisfies the producers and distributors who argue that their income is thereby reduced. We would respond by simply reminding the interested parties that some dissatisfaction is often the by-product of negotiation and compromise. As a footnote, we would ask the committee to consider whether occasional programs should be exempt from these school replay rights whenever production financing cannot be completed without agreement by the producer to withhold these rights from the schools.

Thirdly, we would endorse the formation of a clearinghouse where schools could receive the names and phone numbers of copyright owners or distributors and, whenever the copyright owner or distributor so elected, also be provided with the terms and conditions of a licensing agreement which would become effective on the eighth day after broadcast.

We would look to the educators on this new committee to devise reasonable policies for ensuring that tapes would either be erased after the seventh day or be retained by the schools under a license agreement.

Finally, we oppose the adoption of any compulsory license arrangements for two basic reasons.

First, WNET has enjoyed an exemplary working relationship with over a dozen creative and technical unions and guilds. Some of these guilds in fact have already expressly permitted seven-day school replays of programs created by their members, without requiring additional payments. We have appluaded this collaborative effort. However, guild members, as well as owners and creators of underlying literary and artistic properties justly are required to be paid additional compensation once programs leave the school seven-day replay sphere and enter the conventional audiovisual market. The cumulative additional payments for a major production are substantial and far exceed the producer's licensing fees received, for example, if only one school happened to exercise its compulsory license. Therefore the copyright owner must be in the position to decide whether it is economically feasible to distribute a program to audiovisual consumers on the eighth day after broadcast.

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[1] These consequences, incidentally even are more acute in the face of burdensome fundraising restrictions contained in proposed rules issued by the Federal Communications Commission in a current docket proceeding involving public broadcasting. In the Matter of Commission Policy Concerning the Non-Commercial Nature of Educational Broadcast Stations, Docket No. 21136.

[2] A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting, page 256 (1979).

[3] 2 M. Nimmer on copyright, page 13–48 (1978).

[4] *Dellar* v. *Samuel Goldwyn, Inc.*, 104 F. 2d 661 (2d Cir. 1939).

[5] H.R. Rept. No. 1476, 94th Cong., 2d sess. 119 (1976).

In addition, the existence of a compulsory license might ultimately—and even inadvertently—result in a loss of valuable programming for our general viewers. We foresee this inevitably occurring since certain performers, producers and distributors, who are currently involved in public television, happen to derive their primary revenues from the educational community. It is likely that these individuals and organizations would find a compulsory license to be a serious economic threat and would elect not to appear on television in order to preserve the bulk of their incomes. We therefore believe other licensing alternatives should be explored to avoid jeopardizing these established programming sources.

In closing, we would suggest that the new committee immediately begin working towards the adoption of industry-wide guidelines bearing in mind the following statement from the Carnegie Commission: "The potential of television and radio for learning is only beginning to be explored. . . . Technology is advancing so rapidly that it is difficult to predict in what ways it will shape these media. Even now, however, it is clear that with careful planning, skillful execution and thorough evaluation, telecommunications will play an increasingly fundamental role in the learning processes of Americans of all ages and backgrounds."[6]

Thank you.

[6] **A Public Trust, supra note 2, at 273.**

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MICHIGAN STATE UNIVERSITY,
East Lansing, Mich., *March 15, 1979.*

Hon. ROBERT KASTENMEIER, *Chairman,*
Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: It was my pleasure to be present at the conference held March 2, 1979 to consider off-air taping for educational uses. I wish to add to the record a serious concern which is shared by many of my colleagues in higher education—namely that the legitimate and important needs of the faculty member is not adequately represented in the testimony that has been presented to the committee. Other interests have been well represented—producers, distributors, networks, performers, authors, educational institutions and associations—but not the faculty member in the classroom who daily teaches and interacts with the students who are the next generation's authors, producers, faculty members and hopefully, congressmen and women.

In my opinion (and I have participated in many discussions of the copyright law) compromises are already being made which will seriously limit the ability of teachers at all levels to teach well. If the producers and distributors have their way, "fair use" by teachers will be so narrowly defined in both amount of use and duration of use as to make impossible the use of television recordings in the classroom. I therefore plead for special rights for teachers to make recordings and use them in a non-profit manner in the classroom. Such rights should be for a time long enough for teachers to record in one semester or half-year that which will be viewed in the classroom in the next semester or half-year. Such rights should be for excerpts as long as fifteen consecutive minutes. Such rights should include the right of a scholar to "library" such excerpts for non-profit research and scholarly purposes. Excerpting, like quoting is an essential element in development of new knowledge, in the explanation of old knowledge and is accepted in the print medium as essential to scholarship. Television should not be treated differently than print in this regard. "Fair Use" of excerpts must be liberally allowed in the context of the teaching/learning situation.

In addition, I believe we must have a workable licensing system for the use of total television programs—a system which will be flexible and easy to administer for both producer and user. I recommend a system which will permit the recording and use of whole programs off the air if an appropriate license has been arranged or until the producer makes such an arrangement possible.

It should not be possible for teachers to record whole programs merely to avoid renting them nor should it be possible for producers to deny non-profit use of whole programs by teachers simply because they have not considered the educational applicability of their products.

The potential market for producers is very large and can yield a substantial income for the generators of television materials designed for instructional use. If the producers will accept that the use of excerpts will increase demand for whole programs, we will be closer to agreements which can make it possible to develop new uses of television in education. The licensing system established should be easy for teachers to use. The system should be institutionally based rather than require licenses for individual teachers. Above all it should be flexible so that as yet underdeveloped new uses of television in education can be experimented with.

Finally, allow me to suggest that in addition to the excellent contributions of AECT, NEA, NBA, NAEB, JECT and other educational organizations who made presentations before you at the March 2 meeting, the committee should seek ways of hearing the opinions of teachers and faculty members themselves. They are the "users", who must live with the compromises which the committee you are about to appoint will make. They and the students they teach are the citizens most affected by your decisions.

I urge your committee to provide for teachers and learners in all levels of education the right to:

1. free use of excerpts of off-air television recordings.
2. limited one year use of whole programs for preview and experimental purposes.
3. institutionally licensed use of whole programs through a flexible, producer-operated licensing system.

Sincerely yours,

Erling S. Jorgensen, Ph. D.,
Associate Director, Academic Services,
Professor of Education and Telecommunications.

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The Authors League of America, Inc.,
New York, N.Y., March 7, 1979.

Re Off-air taping.

Bruce Lehman, Esq.,
Counsel, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, Washington, D.C.

Dear Bruce: This is to confirm the request I made to you, prior to the March 2nd Symposium, that The Authors League be represented on the Ad Hoc Committee to be designated to work on guidelines for off-air taping.

I mentioned to you that individual authors and dramatists had a direct and substantial interest in this problem. For example: playwrights own all television and motion picture rights in their works. When a play is produced on television, it is the author's work that is being broadcast, and would be recorded off the air—not a derivative work based on it. Consequently, the dramatist has a direct and immediate concern in guidelines that might permit widespread taping of his play for retention and use in many institutions throughout the country. Such proliferation of recordings of the play and continued exhibition in these institutions could diminish the demand for licenses to stage live performances of his work by college, university and high school groups, by local community theatres, and by stock, regional or repertory companies.

Similarly, authors of books which are adapted for television dramas and documentaries have a direct interest in the recording and performance of the programs based on their underlying books. Such uses could reduce the value of motion picture, television and other rights which they, not their publishers, own.

For these and other reasons, it is essential that the interests of authors and dramatists be directly represented on the Ad Hoc Committee.

Sincerely yours,

Irwin Karp.

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SAN JOAQUIN DELTA COLLEGE,
Stockton, Calif., *February 28, 1979.*

Hon. ROBERT KASTENMEIER,
Chairman, House Subcommittee on the Judiciary and Copyrights, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN: San Joaquin Delta College supports the establishment of a national center for off-air rights. We understand this off-air video taping will be discussed in a meeting held on March 2.

A national center for off-air recording can expedite the process of using these materials in a variety of situations, including classes where they would be most valuable.

Sincerely,

PHILLIP N. LAUGHLIN,
Dean of Instructional and Student Services.

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SHORELINE COMMUNITY COLLEGE,
Seattle, Wash., March 15, 1979.

Representative ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Committee of the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. KASTENMEIER: I would like to express some concerns on fair use of off-air video recordings.

For educational purposes off-air recordings should be acceptable if that particular program will not be made available for viewing again. Many programs have lasting educational values and it seems a real shame that they can't be used. If they are never shown again commercially and no one is deprived of a profit, I think that they should be allowed to be used for educational purposes. This should be allowed until the program can be purchased commercially in some form such as video tape or 16mm. If this cannot be permitted, I urge that one quarter be the minimum time allowed for fair use of off-air recordings. This would allow faculty to get some value from these programs. This would give those of us who are media specialists in two year colleges some flexibility to provide the program to the faculty member at a time that he could use the program effectively.

I am confident that I represent the feelings of the majority of the media specialists in this state.

I request that this input be part of the March 2nd Copyright Committee Conference.

Sincerely,

GERALD R. MAGELSSEN,
Media Specialist.

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MODESTO JUNIOR COLLEGE,
Modesto, Calif., February 14, 1979.

Hon. ROBERT KASTENMEIER,
Chairman, House Subcommittee on the Judiciary and Copyrights, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN: Noting that a meeting concerning off-air video taping will be held at Rayburn on March 2, please place into the discussion the fact that Modesto Junior College has long supported establishment of a national center for off-air rights. When the center idea, including 800 watts lines, was proposed, we wrote that we were prepared to place ten thousand dollars on deposit with the center. That offer stands.

Off-air recording can be an evaluation and delivery system. Instructors can rapidly determine appropriateness of a program. A national center can charge accounts on deposit and ship use labels to be affixed to evaluation off-air recordings. Advantages: speed, no need for shipment of preview films or tapes; maximum savings in that handling and shipping are eliminated; maximum return to producers.

Sincerely,

EDWARD L. MCCLARTY,
Dean.

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UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN,
Urbana, Ill., March 12, 1979.

Mr. BRUCE LEHMAN, Esq.,
Subcommittee on the Courts, Civil Liberties, the Administration of Justice, House of Representatives, Rayburn Office Building, Washington, D.C.

DEAR MR. LEHMAN: Attached are my comments pertaining to the off-air-copying of television programs for educational use. I would appreciate having them included in the printed report.

Sincerely,

JEROME K. MILLER,
Assistant Professor.

Enclosure.

ADDITIONAL COMMENTS

(By Jerome K. Miller, Assistant Professor, Graduate School of Library Science)

My colleagues in education and library science have spoken eloquently of the pressing need for the duplication of television programs for use in classrooms. I fully support the positions they have taken. I prefer not to elaborate on those statements, but to bring another related matter to the subcommittee's attention.

Objections have been raised to the idea of copying a copyrighted work in its entirety as a form of fair use. In its historical development, fair use has often been expressed as giving someone other than the copyright proprietor the right to copy a small part of a work for a non-competitive use. Although the copyright law does not use the phrase, a small part of a work, the concept is expressed in section of Senate Report 94-473 under the heading "The Amount and Substantiality of the Material Used." I would like to point out, though, that a number of exceptions to that concept appear in the Senate and House reports.

We might begin with the section I just cited: Sec. 107 of the Senate Report, under the heading "The Amount and Substantiality of the Materials Used." The report speaks of copying "self contained" and "separately cognizable" portions of a larger work. Several examples are given: a poem, a story, or an article taken from a larger work. According to my understanding of the new copyright law, a poem, a story, or an article are usually separately copyrighted works. The fact that they appear in an anthology or a periodical does not diminish the fact that they are, or may be, separately copyrighted works. If that is the case, the reports appear to give their blessing to the duplication of a small copyrighted work in its entirety. Other examples can be found in the two reports.

Section 107 of the Senate Report speaks of making a sound recording by a volunteer for the use of the blind.

The Making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107.

The next paragraph of the Senate Report suggests that it is acceptable for a library or archive to reproduce a film in nitrate stock for purposes of archive preservation.

Section 107 of the Conference Report (94-1733) suggests that the duplication and reproduction of multiple copies of television programs for the purpose of distributing captioned copies to institutions serving the deaf, is a legitimate form of fair use.

Section 108(f)(3) of the law permits libraries and archives to reproduce television news programs and to make to limited number of copies for scholarly use.

Another example comes from the final report of the National Commission on the New Technological uses of Copyrighted Works. On page 98, in footnote 171, in speaking of copyright protection for computer programs, the report suggests that it would be a fair use for a scholar to duplicate a copyrighted computer program in its entirety for the purpose of research, on condition that the copy be erased at the end of the research project.

Obviously, many of the examples I cited pertain to the duplication of materials for the purpose of preservation, for research, or for the handicapped. The point must be made, though, that under certain circumstances, the duplication of a copyrighted work *in its entirety* does fall within the bounds of fair use.

If the duplication of a television program for educational uses is a fair use, and it seems obvious that it is, then some guidelines must be prepared to help educators understand the extent and limits of this application of fair use. I propose that the following guidelines be adopted as a balancing of the interests of the proprietors and the educators:

1. All copying of television programs must be done at the specific written request of a teacher. The written request must indicate the class or classes in which the copy will be used.
2. The copies are to be made by a student or by a school employee.
3. The recording will be used solely in the course of face-to-face teaching in a classroom, laboratory, or other place customarily used for teaching.
4. Only one copy of the program may be made.
5. The videorecording will not be used outside the institution or school where it was made.
6. The copy must be erased within 20 "teaching days" of the time when it was recorded.

My suggestion that the period of retention be based on "teaching days" is prompted by the experiences many midwestern school districts have had this winter. Many schools have been closed for days at a time because of the storms. By allowing them to retain a program for up to twenty teaching days, teachers will have an opportunity to make an orderly use of the program before it must be erased.

7. Programs which are currently available for sale, lease, or lending may not be copied under the terms of fair use.

This would apply to the reruns of educational and entertainment programs which are now available from educational and feature film distributors. The capying of this type of material clearly deprives the copyrighted proprietors of a legitimate return on their investments and it should not be permitted.

I sincerely hope that the fair use guidelines for off-air-copying of television programs for educational uses are prepared and distributed soon. The availability of a reasonable set of guidelines will be advantageous to both educators and the copyright proprietors. The educators will benefit from having guidance in the matter so that they may use the available technology with a clear conscience. The proprietors will benefit too, since any reasonable set of guidelines will undoubtedly forbid some of the practices now found in the schools.

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Butte College,
Oroville, Calif., February 23, 1979.

Hon. Robert Kastenmeier,
Chairman, House Subcommittee on the Judiciary and Copyrights, Rayburn House Office Building, Washington, D.C.

Dear Congressman Kastenmeier: It has come to my attention that a meeting has been scheduled for March 2nd regarding off-air video taping. Butte College supports establishment of a national center for this purpose.

Off-air recording can be an evaluation and delivery system. Instructors can rapidly evaluate the appropriateness of a program and the national center can charge accounts on deposit and ship use labels to be affixed to evaluation off-air recordings. The advantages of this center would be speed, no need for shipment of preview films or tapes; maximum savings in handling and shipping; and maximum return to producers.

Please be assured of Butte College's present and future support of this project.

Cordially,

James G. Mitchell,
Dean of Administrative Services.

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Media Action Research Center, Inc.,
New York, N.Y., April 4, 1979.

Mr. **Bruce Lehman**, Esq.,
Council Subcommittee on Courts, Civil Liberties and the Administration of Justice, Committee on the Judiciary, House of Representatives.

Dear Mr. Lehman: I am writing regarding the fair use and off-air recording by non-profit educational institutions and the conference on Off-Air Taping for Educational Uses sponsored by the Subcommittee on Courts, Civil Liberties and the Administration of Justice and the Copyright Office of the Library of Congress on March 2, 1979.

The Media Action Research Center, Inc. is an independently incorporated not-for-profit organization. It's work is made possible by grants and individual contributions. The center was established in 1974.

MARC is incorporated in the State of New York under section 216 of the Education Law and section 404 of the Not-for-Profit Corporation Law. It has been granted sections 501(C)(3) and 509(A)(2) status by the United States Internal Revenue Service.

MARC's purposes are:

To study the impact of television on viewers through scientific research.

To make available in understandable form information about what is known about TV's influence.

To help viewers develop strategies for a more intentional selective questioning approaches to viewing through workshops and other events.

To help bring about positive changes in the television system.

It is MARC's position that off-the-air recording, duplication and exhibition of brief program segments and complete commercials should be allowed for use in training or teaching environments for the purpose of criticism, teaching and evaluation of the role and effects of television on society and on individual viewers. Furthermore, off-the-air recording should be allowed of total programs for the purpose of scientific research.

This kind of use of off-the-air recorded material complies with the accepted fair use doctrine and should be clearly stated by law. Television, as no other medium, is not available to the consumer for careful study, evaluation and criticism. It cannot be scheduled for the convenience of reviewers, critics or teachers; commercials and programs often cannot be secured in any other way than off-the-air recording; social criticism is difficult and often impossible because the material is not available and is controlled by the producer and distributor. Since television programs are directed to the public, the public should have the right of access to the material, not to compete with the producer, but rather to allow comments in the public interest on programs and commercials.

Sincerely yours,

Nelson Price.

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State of Oregon,
Department of Education,
Salem Oreg. March 14, 1979.

Robert Kastenmeier,
Chairman, Subcommittee on Courts, House of Representatives, Rayburn Building, Washington, D.C.

Dear Representative Kastenmeier: Limiting off the air recording creates a problem in the schools in this state. There are many valuable programs, and we need them to use to help in the educational process. It is unrealistic to not allow schools to record material and use it for instructional purposes during the school year it is broadcast. If material is of short term educational value, less than one year, why establish rules that prohibit use of the materials. Such action only assures that our kids get the short end of the stick, educationally.

What if the material is of only short term educational value, and the law establishes a fee system? Now a dilemma exists. Those who do not understand the system may choose again to do nothing; another short stick. Or they may choose to use the material and pay the fee. This means paperwork including purchase orders and other indirect costs to the district, probably exceeding the fee! Now the district may choose not to let the teacher use the information. Let's face it, the fee for usage of an item of short term value cannot be very much or it will prohibit use of that item; short stick again. Now a third option surfaces. What if the teacher chooses to use the material, and it really doesn't work that well so he decides to not fill the bureaucratic paperwork? It's nearly impossible to enforce the policy; so why enact it? That is like leaving the key in the ignition of your fancy, new sports car causing a good kid to go bad. We don't need any more moral decay in the USA. Upon close examination, who would be guilty of the moral decay? Would it be the legislator who chose to enact or interpret the policy? Would it be the lobbyist who convinced the legislator? Would it be the violator? Or would it be a combination of all the above? Unless it is entirely the violator, it would be unwise to enact such a policy.

Broadcast materials having longer than short term value, more than one year, do not have the same inherent problem as short term materials. First, the teacher has had time to try the materials in the classroom and to evaluate their effectiveness. This is the same as most selection procedures for other educational materials such as filmstrips. Then, after examination, the school district can budget for the long term use.

With a school year to try the materials, confusion over rights is lessened. Further, the moral issue subsides as now the material is proven to be of exceptional educational value, and rational decisions can be made.

It is unrealistic to not allow schools to record broadcast material and to use it instructionally in the classroom during the year it is broadcast.

I support any agreement that can be made toward allowing educational agencies to record programs off the air and to use these programs for nonprofit instructional purposes for the period of one school year. This would help teachers to integrate the materials into their curriculum.

I would appreciate having this testimony included in the report read into the March 2 record.

Cordially,

JAMES W. SANNER,
Specialist, Instructional Technology.

STATEMENT BY NEW YORK STATE EDUCATIONAL COMMUNICATION ASSOCIATION

The New York Educational Communication Association, a professional association dedicated to the education of children through media, is quite aware of the problems educators face in using television programs for instruction. All too often special programs are broadcast which fit directly into the curricula but, because of the complexities and uncertainties of the copyright law, many educators refuse to use them out of fear of being in violation. In addition, sponsors frequently notify schools of the programs prior to broadcast and some even offer guides and supplemental materials relating directly to the programs and the teaching of the subject covered. Still, because of the uncertainties, teachers cannot use the programs.

Although we recognize the problems facing educators who wish to use television programs for instructional purposes, we also understand the needs of the producers, craft unions and creative talent. Unfortunately, all sides in this copyright dispute seem to have expressed their positions as if they occurred in a vacuum. It is the position of this association that a common ground can be found if reason and cooperation prevail.

A modest license fee would help alleviate the problems of all sides. Schools would be able to use the programs at the appropriate moment, producers and members of the craft unions could receive additional remuneration at the time of production and creative talent would have additional incentive to continue to be productive.

There are 15,834 school districts in the United States, most with a multiplicity of school buildings. If a fee of ten dollars per program per district were set, and only one quarter of the districts responded, there would be an additional increase in revenue of almost forty thousand dollars. This example is illustrative only, but it does show how everyone can be legally served and still maintain a positive posture.

If the claims of Mr. David Davidsen of Learning Corporation of America are correct, that the educational film industry, in 1977, spent two million dollars more in film production than it grossed, this industry should welcome a change to receive additional revenues without the expense of raw stock, previews, billing and collection.

It is imperative that whatever solution is agreed upon, that the language be clear and concise. The ambiguities of the current law adds to the problems, since most sides seem to choose an interpretation which best suits a preconceived idea.

Congress is to be applauded for its continuing efforts to bring all sides of this issue together. The New York State Educational Communication Association stands ready to assist in any way possible to help insure a just and concise resolution to off-air taping for educational purposes.

Respectfully submitted,

ARNOLD F. SPARR.

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GROSSMONT UNION HIGH SCHOOL DISTRICT,
La Mesa, Calif., February 23, 1979.

Hon. ROBERT W. KASTENMEIER,
Committee on the Judiciary, House of Representatives, Chair of the Subcommittee on Courts, Washington, D.C.

DEAR MR. KASTENMEIER: For the last few years many educators have been playing mental gymnastics in trying to develop an off-air video tape policy—a policy that would firmly recognize present technology, and in doing so, attempt to balance the rights of the copyright holder with education's needs to utilize television programs for the "teachable moment".

In March, 1978, after three years of research, discussion with copyright holders, educational entities and legal counsel, and "out-on-the-limb practices", our Governing Board adopted the attached copyright policy which deals with off-air video taping and other copyright guidelines. Inherent in the framework of this policy is the recognition that renumeration to a copyright holder for creative efforts is of paramount importance. This recognition acknowledges the underlying concern of producers/distributors and also provides the educational system with immediate access to preview/evaluation of materials that may be acquired as they become available. To insure that this privilege is not abused, the utilization of off-air video tapes is accomplished within a specified time frame and under systematic control of each of our educational sites. Determination of the availability/source for materials is accomplished through the use of correspondence to the appropriate networks.

It is our experience that many distributors of instructional materials are encouraging the process of utilizing television as an evaluation tool. Further, in the three years we have openly operated this service, producers/distributors have expressed support for this system. My interest in providing this information to you is the Copyright Meeting planned for March 2, 1979 in Washington, D.C. Since this meeting will focus on resolving the off-air video taping controversy, I felt you should be apprised of a workable option presently in effect.

While this position may raise more questions than it solves, it does attempt to speak to the issue of responsive balance, as well as meet several of the criteria for Fair Use. Much more could be said concerning the background rationale, research, and legal opinions that have been rendered concerning our District's present policy and regulations. If, after reviewing this information, you would like to discuss this material further, please contact me. Should the opportunity be available, I would enjoy participating in subsequent committee meetings discussing this topic.

The March 2 meeting is the beginning of an eclectic process in working through a difficult, but obtainable, goal. I look forward to the impact and promise this, and subsequent meetings, will have in extracting us from the television/video taping quagmire. Good luck!

Sincerely,

RAY L. STANSBURY,
Coordinator, District Media Services.

Enclosures.

COUNTY OF SAN DIEGO,
OFFICE OF COUNTY COUNSEL,
San Diego, Calif., February 1, 1978.

Re Proposed policy concerning the reproduction and use of copyrighted materials (78-0011/RBH).

Dr. LELAND B. NEWCOMER,
District Superintendent, Grossmont Union High School District,
La Mesa, Calif.

(Attention of John C. Barrons, Assistant Superintendent, Business).

DEAR DR. NEWCOMER: You forwarded to us for review and comment a copy of a proposed district policy intended to establish regulations governing the reproduction and use by personnel of your district of copyrighted materials. The proposal makes reference to the Copyrights Act, Public Law 94–553 enacted October 19, 1976 and made effective January 1, 1978, which revised Title 17 of the United States Code embodying the copyright law.

In accordance with your oral request we have examined the policy to determine its general suitability to implement the provisions of the new statute and have not made a detailed analysis of particular provisions or terminology. A number of the restrictions and conditions in your policy apparently reflect assumptions made as to reasonable regulations which should be imposed to ensure compliance with the copyright law, but as many of these are not spelled out in the statute nor in any official implementing regulations of which we are aware, we are not able to express an opinion as to whether they would be upheld if challenged by court action. Nevertheless, we consider that the provisions of your policy are consistent with the provisions of the Copyrights Act of 1976 and also are in accord with information we have received concerning "guidelines" said to have been established by the House Judiciary Committee when considering the new legislation.

Basic to the determination of appropriate regulations to avoid allegations of infringement of copyright by a school district are the limitations on the "exclusive rights" of the owner of copyright (set forth in 17 U.S.C. § 106) contained in 17 U.S.C. Section 107 which states in part that "Notwithstanding the provisions of Section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringment of copyright." A paragraph of your policy under the heading "Printed Materials" lists the factors set forth in 17 U.S.C. Section 107 to determine whether a use of a copyrighted work is a "fair use" and policy provisions relating to "Non-print (Off-The-Air Video Taping)" and "Printed Materials" are pertinent in an attempt to restrict reproduction and use of such materials to the "fair use" concept of the statute. However, it should be noted that the provisions of Section 107 apply to all copyrighted works concerning which the owner of copyright otherwise would have the exclusive rights listed in 17 U.S.C. Section 106, not all of which are covered by your policy. As stated in 17 U.S.C. Section 102 there is copyright protection in "original works of authorship fixed in any tangible medium of expression . . ." which include:

(1) literary works:
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.

In summary we consider the provisions of your policy to be acceptable and to constitute appropriate guidance for avoidance of copyright infringement with respect to the subjects with which your policy is concerned. It may be that certain of the provisions are even more restrictive than necessary, inasmuch as the "fair use" of a copyrighted work for "teaching" and "scholarship" as set forth in 17 U.S.C. Section 107 is not defined in the statute except by reference to the listed factors to be considered in determining whether the use made of a work in a particular case is a "fair use". However it is certain that there cannot be wholesale copying of copyrighted materials and that limits must be set as to time and content for reproduction and use of protected matter for education purposes without permission of the owner of copyright.

If additional discussion of these matters is desired, please so advise us.

Very truly yours,

Donald L. Clark,
County Counsel.
Robert B. Hutchins,
Deputy.

Reproduction and Use of Copyrighted Materials

(Non-Print/Print)

It is the intent of the Governing Board to delineate, enforce, and abide by the provisions of the current copyright laws as they affect the district and its employees.

Copyrighted materials, whether they be non-printed or printed, may not be duplicated without first receiving written permission from the copyright holder or fall within guidelines presented in administrative regulation ECHC–R.

The district does not sanction illegal duplication in any form. Employees who willfully violate the district's copyright position do so at their own risk and assume all liability-responsibilities.

Adopted 3/6/78.

Legal Ref.: United States Code, Title XVII.

REQUEST FOR OFF-AIR VIDEO TAPING

I, the undersigned, having requested the District Instructional Media Center to video tape the following program(s) within the parameters of the guidelines set forth March 6, 1978, am aware of said guidelines (see reverse side) and agree to accept responsibility for the use and erasure of this material to prevent any infringement of copyright law in lieu of expressed written approval of the copyright proprietor.

Requestor's name (please print) ____________________
School ____________ Department ____________
Title of program to be copied ____________________
Date of program ____________ Date material is needed ____________
Time of program ____________ Station or channel ____________
Length of program ____________ Signature ____________
Special instructions ____________________
____

GUIDELINES FOR VIDEO SERVICE FOR OFF-AIR RECORDINGS

The District Instructional Media Center operates an off-air video tape recording service for district schools. The service is available 24 hours a day, Monday through Friday, and includes television channels 6, 8, 10, 12, 15, and 39, primarily, and other channels as they become available. The main purpose for this service is to provide a means of previewing instructionally related materials for possible purchase, lease, or rental by the district, and to enable teachers to replay television programs within a specified period.

Therefore, in the absence of *formal guidelines*, and to help prevent problems involving copyright violations on the part of the district, or district employees, off-air taping of instructional materials shall be accomplished *only* under the following conditions:

1. Any teacher desiring that an instructionally related television program be taped by the district for classroom use shall complete a "REQUEST FOR OFF-AIR VIDEO TAPING" form. Such request must be signed which, in effect is an agreement to abide by the provisions of this policy. If a school elects to video tape at the local unit, a similar form must be used.
2. Unless otherwise authorized, all video tape recordings shall be erased no later than three weeks after the taping of the requested program (e.g., some instructional television programs broadcast by the San Diego County Department of Education can be retained for the entire year. Consult your county instructional television guide for details.)
3. No taped program shall be exchanged with other schools in the Grossmont Union High School District, or other school districts, without specific written approval of the Associate Superintendent.
4. The taped program shall not be used for public viewing.
5. The taped program shall be used for the specific curriculum application for which the request was intended, and no other curriculum application is authorized.
6. Video tape libraries of commercial and non-commercial (educational) programs may only be established with written approval of appropriate copyright holder. The District Instructional Media Center will be responsible for directing all formal requests for permission to use or retain copyrighted television programs.
7. Published lists of authorized video tape libraries shall be prepared and maintained for each local unit collection.
8. Individuals are required to fill out and return a preview evaluation card for each program video taped.

Requested programs will be duplicated in color. These color programs are compatible with an NTSC color signal standard. Sony color video tape recorders models AV-8600 or AV-8650 conform with this specification. The Sony Color Video Tape Recorder Model AV-5000(A), which the majority of schools have, do not utilize this standard and will therefore only play back a color program (generated on our equipment) in monochrome (black and white).

Teachers requesting video service are required to supply the correct amount of tape to complete the duplication process. Video tape is available through the district warehouse. We encourage you to purchase from this source to assure you a financial savings, increased quality and tape longevity, reduction of excessive wear to the video equipment and quick delivery of needed materials.

The turn around time for processing requests will vary from one to three days depending on the work load and number of requests for any one program. If you have any questions concerning this service, please contact Ray Stansbury (461-3554).

REPRODUCTION AND USE OF COPYRIGHTED MATERIALS

(Non-Print/Print)

The local unit chief administrator is responsible for the enforcement of the provisions of this regulation. He or she will identify an individual to act as a liaison person for staff information (inservice), control of approval process (written and verbal), and the maintenance of written records relative to the duplication and distribution of copyrighted materials.

NON-PRINT (OFF-THE-AIR VIDEO TAPING)

The district instructional media center operates an off-the-air video tape recording service for district schools. The service is available 24 hours a day, Monday through Friday, and includes television channels 6, 8, 10, 12, 15, and 39, primarily, and other channels as they become available. The main purpose for this service is to provide a means of previewing instructionally related audio-visual materials for possible purchase, lease, or rental by the district, and to enable teachers to replay television programs within a specified period.

In October of 1976, P.L. 94–553 (Copyrights Act) was signed into law providing the first full-scale revision of American copyright laws since 1909. Congress, however, recognized, but did not resolve, "fair use" of off-the-air taping for nonprofit classroom use of works incorporated in radio and television, such as they did for printed materials.

Therefore, in the absence of formal guidelines, and to help prevent problems involving copyright violations on the part of the district or district employees, off-the-air taping of audio-visual materials shall be accomplished only under the following conditions:

1. Any teacher desiring that an instructionally-related program be taped by the district for classroom use shall complete a "Request for Off-Air Video Taping" form (Exhibit ECHC-E). Such request must be signed, which, in effect, is an agreement to abide by the provisions of this regulation. If a school elects to video tape at the local unit, a similar form must be used.
2. Unless otherwise authorized in writing by the associate superintendent or his/her designee, all video tape recordings shall be erased no later than three weeks after the taping of the requested program e.g., some instructional television programs broadcast by the County Department of Education can be retained for the entire year. (Consult your county instructional television guide for details.)
3. No taped program shall be exchanged with other schools in the Grossmont Union High School District or other school districts without specific written approval of the associate superintendent or his/her designee.
4. The taped program shall not be used for public or commercial viewing.
5. The taped program shall be used for the specific curriculum application for which the request was intended and no other curriculum application is authorized without the written approval of the associate superintendent or his/her designee.
6. Video tape libraries of commercial and non-commercial (educational) programs may only be established with written approval of appropriate copyright holder. The District Instructional Media Center will be responsible for directing all formal requests for permission to use or retain copyrighted television programs.
7. Published lists of authorized video tape libraries shall be prepared and maintained for each local unit collection.
8. Individuals are required to fill out and return a Preview Evaluation Card for each program video taped.

LETTER OF REQUEST FOR INFORMATION TO MAJOR NETWORKS

A request for information as to the availability of a television presentation, which has been determined by teachers' preview to be of educational value for classroom use, shall be made to the appropriate major television network (NBC, ABC, CBS). Information requested will include the following (see Exhibit ECHC-E(1)):

1. Agency holding distribution rights to educational institutions
2. If and when program will be available to the educational market
3. Type of film or video format to be used
4. Procedure for purchase, rental, or lease agreement

REQUESTS TO NETWORKS FOR PERMISSION TO TAPE OR RETAIN COPYRIGHTED WORKS

Although some producers allow nonprofit organizations to reproduce their materials, they must first review the status of their copyright to determine whether or not they have the power to grant permission. Regardless of the standard policy a producer may have regarding the granting of duplication rights, each request requires a careful checking of the exact materials to be duplicated. Therefore, requests to producers for permission to duplicate copyrighted audio-visual materials shall include the following information:

1. Correct title of the material

2. Exact description of the material to be used (i.e., test, visuals, soundtrack, etc.)

3. Type of reproduction

4. Number of copies to be made

5. Use to be made of reproduced materials: If the material is a video cassette, specify whether the intended use involves single-receiver playback or multiple receivers. If the intended use involves transmission of the material, specific information should be supplied as to the method of transmission; whether radio or television, open or closed circuit. In such cases, many license agreements require that the number of students in the intended audience be stated.

6. Distribution of the reproduced material: If transmission is involved, information should be provided on the extent of the reception area and the probable number of viewers. At the secondary level the number and type of buildings, number of students in each building, and the number of playback units should be included.

PRINTED MATERIALS

No employee of the Grossmont Union High School District shall duplicate in any manner, any printed copyright material unless such duplication and its use falls within the boundaries of the "fair use" doctrine.

The Copyrights Act attempts to define "fair use" and establishes fixed limitations on duplication for schools and libraries. The law codifies four standards for determining fair use: (1) The purpose and character of the use including whether such use is of a commercial nature or for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole: and (4) the effect of the use upon the potential market for, or value of, the copyrighted work.

The principal shall determine where each copy machine is to be located and shall cause a copy of the "Printed Materials" section of this regulation to be posted in the immediate vicinity of each copy machine.

The following guidelines for duplication of printed copyright materials will be observed by all employees of the district:

1. Books and Periodicals:

a. A teacher or designee may make a single copy of any of the following for use in teaching or preparing to teach:

(1) A chapter from a book;

(2) An article from a periodical or newspaper,

(3) A short story, short essay or short poem; whether or not from a collective work; and

(4) A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

b. A teacher may make multiple copies (not to exceed more than one copy per pupil in a course) of any of the following:

(1) Poems or excerpts of poems of less than 250 words;

(2) Complete articles, stories, or essays of less than 2500 words;

(3) Prose excerpts of 1000 words or 10 percent of the work, which ever is less;

(4) One chart, graph, drawing, etc., per book or periodical issue; and

(5) Excerpts from childrens' books containing up to 10 percent of the works in text.

c. A teacher may not make multiple copies of the following:

(1) Works that have been copied for other courses in the school;

(2) More than one work or two excerpts from one author in one term;

(3) More than three works or excerpts from one anthology or periodical volume in one term; and

(4) Works more than nine times in one term.

4. A teacher *may not* make copies of:

a. Works to take the place of anthologies;

b. "Consumable" works such as work books and test booklets; and

c. The same work from term to term.

In each instance where multiple copies are allowed, each copy must include a notice of copyright.

B. Music and Recordings:

As with guidelines for books and periodicals, duplicating copyrighted musical works is prohibited to replace collective works or "consumable" materials. In addition, music educators *may not* copy such works for purpose of performance or to substitute for the purchase of music.

A music educator *may* copy printed music in the following limited circumstances:

1. Emergency copying to replace purchased copies which are needed for a performance;

2. Copying of excerpts of works for non-performance purposes, if they do not comprise performable units (e.g., a movement), and are less than 10% of the works; and

3. Copying of complete works if out of print or unavailable except in large works and used for teaching purposes.

Schools are permitted to retain single copies of the following recordings:

1. Performances by students for evaluation or rehearsal purposes.

2. Recordings made for the purpose of constructing aural exercises or examinations.

C. Reproduction of Works by Libraries:

The Copyrights Act imposes major restrictions on reproduction of works by school libraries. Systematic duplication of multiple copies is forbidden by law with exception of the following carefully defined exceptions:

1. Inter-library loan arrangements are permitted, provided that copying is not done to substitute for subscriptions to or purchase of a work.

2 Libraries may make up to six copies of the following:

a. A periodical article published within the last five years.

b. Excerpts from longer works.

3. Libraries must keep detailed records of all inter-library loan requests.

4. Libraries may make *single* copies of articles or excerpts of records or longer works for students, provided the articles become the property of the student.

5. Libraries may make copies of unpublished works for preservation, published works to replace damaged copies, and out-of-print works which cannot be obtained at a fair price.

To avoid liability for copyright infringement on the part of the library or an employee as a result of unsupervised duplicating, libraries must display notices to the effect that making a copy may be subject to the copyright law.

D. Educational Performances and Displays:

The Copyrights Act defines use of copyrighted material in classroom teaching and educational broadcasting. Teachers may use such material in "face-to-face" teaching activities. Such protection does not extend, however, to knowing use of unauthorized reproductions of works.

Nonprofit instructional broadcasts are given limited protection from infringement claims. An exemption is granted to works used in regular instructional programs for both closed circuit and open circuit in-school reception. In such situations, broadcasters need not obtain permission to perform non-dramatic literary or musical works, but must receive permission to act out dramas or musicals or show motion pictures and slide shows.

GROSSMONT UNION HIGH SCHOOL DISTRICT,
La Mesa, Calif.

(Major Network, NBC, ABC, CBS (Not a local affiliate)).

DEAR SIR: On____________teachers within our district viewed the program ________________. The quality of this program and the potential educational values for classroom use have prompted us to seek information concerning the agency holding distribution rights to this material to educational institutions. If this program is to be distributed to the educational market, we would appreciate knowing when it will be available, the type of film or video format to be used, and the procedure for purchase, rental, or lease agreement.

While off-air video taping is a means of acquiring televised programs, we are requesting information for the legal acquisition of this program and hope we may hear from you concerning the above at your earliest convenience. Should you be unable to provide our district with the above information, please forward this request to the proper agency.

Sincerely,

RAY L. STANSBURY,
District Media Specialist.

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STATEMENT SUBMITTED BY LOS ANGELES COMMUNITY COLLEGE DISTRICT

Mr. Chairman, Ladies and Gentlemen: My name is Bill Troost, and I am here to represent the Los Angeles Community Colleges. We in Los Angeles are particularly sensitive to the problems of the educational application of television programming. This is because Los Angeles itself is a major center of television and film production. But what is more important is the size of our educational institutions, and the extensive commitment which we have made to the new technology in education.

The Los Angeles Community College District consists of nine separate colleges located in different parts of the Los Angeles metropolitan area. This system is the largest community college system in the United States. It offers 3,000 different courses of study and enrolls approximately 126,000 students annually. Its yearly expenditures exceed $230,000,000.

Our colleges number 4,500 faculty members. Our instructional staffs are progressive and innovative, and well attuned to the use of the new educational technology in their instruction. Consequently, each of the colleges budgets heavily for the purchase of audiovisual materials. This has been true for many years.

Our college district has consistently supported distributors and producers of audiovisual materials with large-scale purchases. In addition, large sums have been invested in equipment developed by the industry, necessary for utilization.

Moreover, Media personnel in all nine colleges have worked for many years to promote the classroom use of media in general and television in particular among our faculties. We have also devoted considerable effort to the training of faculty in the instructional use of television. We feel that these efforts have widened the market for producers of film and television programming. In coming years, our instructors will continue to demand audiovisual materials of high quality.

There are, however, many programs shown over commercial television which are not available to us, programs which we feel would be of significant educational value to our students. We hope that the pending negotiations will enable us to gain access to these materials for our students through the techniques of off-the-air recording.

The Los Angeles Community College District favors a policy which would permit optimum access to information on network TV. Programming available on television has broad application in all subject areas. Our students need to be provided with the finest learning experiences possible. Only in this way can they take their appropriate place in our complex and troubled society.

We would hope that four general principles would be embodied in the solution to the problem of off-the-air television taping.

1. The use by educational institutions of television programming should be recognized as an important educational resource for students. Any necessary constraints on access to programs for the protection of copyright holders must be weighed against the potential for depriving students of information and experience of significant value.

2. We support the principle that professional educators, on behalf of students enrolled in schools, colleges, and universities, should be provided with the greatest possible freedom and flexibility in utilizing the resources of broadcast television.

3. The people who have devoted effort, talent, and capital to the protection of television programming should be remunerated so as not to discourage the production of high quality broadcast material. At the same time, the need for protection and for reward of creativity should not overshadow the equally compelling social importance of broad educational access to the products of that creativity.

4. Whatever procedures are developed, they should be definitive and unambiguous. They should be easy for teachers to apply to everyday needs. They should be easy to administer. The costs of implementing such procedures should be a major criterion; our colleges, no less than government agencies, must more than ever be concerned about fiscal and operational constraints.

We in the Los Angeles Community College District have no doubt that some procedures and significant clarification will result from the concerted efforts of the people in this room. Producers, artist, educators and legislators working together can resolve their problems to the greater benefit of our society. Our society, you should recall, is made up of individuals who have been educated in our schools and colleges. It is for them that your deliberations will have the most profound educational implications.

Hon. BARBARA RINGER,
Hon. ROBERT KASTENMEIER,
Hon. THOMAS RAILSBACK,
House Committee on the Judiciary,
Rayburn House Office Building
Washington D.C.:

I wish to submit the following proposal as a suggestion for possible solution of the off air taping controversy. I realize the agenda of the March 2 meeting is a full one and I hope that my ideas might somehow be useful/discussed/and included in the record.

The suggestion is that the PUBLIC SERVICE CONCEPT offers an attractive alternative to the idea of establishing a clearinghouse for off air videorecording. The public service concept would provide a more simple, workable solution to the off-air problem wherein each party (users and producers) could benefit. The public services concept would allow producers and/or networks a limited amount of tax write-off in exchange for the schools rights to videocopy their programs. Arrangements could be made at the time a network contracts with a producer concerning a program to be aired on a future date. Attorneys would at that time have to work out how the money from the write-off would be distributed among the various interests in that particular copywright (i.e. how much to the screen writer, the musicians, actors, etc.) A tax law expert has indicated that the write-off allowable to networks might consist of a specially designated tax credit. It could be based on a figure such as 1–2 percent of the original cost of the program to the network, a percentage of the gross profits realized, or on the actual production costs involved in the airing of a particular show. Producers could be given a similar credit or could contract for payment from the network in return for public services rendered. The special tax credit would be allowed over and above presently allowable deductions (which range above the 70 percent level), against procuring a film for TV during the first year of usage. Programming such as game shows and soap operas might not be granted eligibility for the credit. Such a solution would be an improvement over the present situation, wherein many schools copy without authorization and networks/producers lose sales.

It is apparently true that under BMI-ASCAP clearinghouse arrangements, copyright holders are protected, and radio stations are monitored by means of roving FCC agents who record programs and then cross check for royalty payments. Radio stations are not aware of when, or if, they will be monitored. Violators can be cited. If the licensing/clearinghouse solution were adopted for off-air taping by non-profit institutions, it would have to be monitored in some similar form. As school classroom playbacks of shows are not broadcast to the general public (they are usually displayed on small portable closed circuit units) monitoring would have to consist of physically sending governmental officials to all institutions making off-air tapes. This task would be most formidable, if not impossible as there are literally thousands of schools to be checked. The expense of enforcement by government agencies would be staggering.

Under the public service concept, a blanket amount to cover all instances and use of the materials would be granted within the 2 percent deduction or whatever amount was agreed upon. There would be no need to monitor for violations, nor would there be any monetary losses to copyright holders, and programming would be allowed to circulate until its social value was negligible. Students in the Republic of Germany benefit to a great extent from an arrangement such as the public service concept. In the German system, a special tax is levied against video equipment when it is sold and then is applied to remuneration of producers/copyright holders when programs are used as a public service. There are many who feel that our students/future citizens should have equal benefits and access to the best educational experiences that we can offer. Access to educational information should be available regardless of the financial status enjoyed by the school a student attends. Thus the public service concept might create great advances in the equality of educational opportunity.

Under a clearinghouse structure, there would be a need for the creation of clerical positions or even offices in larger educational systems to handle royalty/license payments. Many school offices are experiencing great difficulty in handling royalty payments for using music in campus performances as dictated by the new law. Schools are organized differently than radio stations. A recent article in Variety reported that more than 1,000 colleges and universities have not responded to BMI alone in regard to licensing arrangements. There is widespread dissatisfaction with rates charged as well as payment for materials not used. Letters have been sent threatening costly legal actions. These letters add to the frustration of educational institutions over the licensing approach. The clearinghouse concept with respect to video recording would intensify the problems we are presently experiencing while adding further financial burdens.

It is realized that the public service concept might require additional legislative action, but it seems that it would provide greater uniform fairness, broader and easier access to materials, and perhaps most importantly larger and more dependable income to producers and copyright holders. Once enacted, there would be no expense to government agencies for enforcement. Attorneys are always quick to point out to educator audiences that guidelines outline the most conservative practices in regard to fair-use-school applications. Guidelines often leave users with a very unclear idea of what is and is not acceptable, and as the lawyers say ". . . they bear absolutely no force of law".

In closing I would like to say that enactment of the public service concept or some measure that would give all students in the United States, access to our best experiences would represent a tremendous contribution by the legislature to our citizens of the future.

Submitted by,

F. William Troost, Ph.D.,
College Media Consultant.

This statement separate and distinct from position of the Los Angeles Community College District.

BMI Warns Colleges

Some 1,000 colleges who've failed to sign agreements with BMI have been placed on notice by the music licensing organization to cease and desist from further public use of BMI music.

The notices are based on the new Federal copyright law, which went into effect Jan. 1, which requires licensing by these institutions. Alan H. Smith, BMI licensing veepee, has informed the colleges on notice: "Continued use after this notice may be considered as a willful infringement and we will be compelled to take whatever legal steps may be necessary to protect our rights."

School Association Director Hits Music Licensing Deals With Colleges

COLUMBIA, S.C.

Editor, *Variety:*

In a recent issue of *Variety* (Jan. 3) Stanley Adams of ASCAP reported, among other things, that ASCAP had "negotiated" with the educational community regarding music use licenses and that there had been "widespread general acceptance" among the campuses of these licenses. As a member of the delegation from the educational organizations involved in these discussions with ASCAP, I must take issue with these statements.

A meeting where ASCAP asserts its rates with little change or effective discussion is not ordinarily called "negotiation." In addition, the results of these discussions were accepted by the educational community only in the most grudging and resentful way.

Certainly, educators accept the premise of the copyright law that artists and composers should be paid for the use of their work. The new copyright law, in that it seeks to provide remuneration for composers, arrangers and other creative individuals for their works, is proper in this general intent. The problem lies in that it allows performing rights agencies to demand license agreements which have a deleterious effect on those eleemosynary and public organizations which provide significant and, indeed, culturally vital public service.

The licenses are grossly wrong and unfair in several ways. For example, they place the burden of payment for music use on schools. Granted, it may be hard for the performing rights agencies to collect from intenerant musicians and the American Federation of Musicians does not want its member musicians to pay. But that is not to say it is fair or reasonable to force the schools to be the ones to pay.

In effect, ASCAP treats colleges and universities exactly like taverns, nightclubs, and honky-tonks. As in the past, nightclub owners have to pay the fees, as opposed to the musicians who, although selecting the work and making it an integral part of their making a living, do not. The judicial reasoning is that the nightclub owners were the "ultimate beneficiaries" deriving the profit from the music's use. Now, educational institutions are legally the same as nightclubs, taverns, and honky-tonks, even though it is the musician and one's agent who make the profit, and it is the community which is the ultimate beneficiary.

In addition to the burden of payment and the forced payment for music not used, the fees are grossly unfair. Schools with 500 or fewer students, representing about 25 percent of the higher education institutions in the country, pay the minimum charge to BMI, ASCAP, and SESAC, that is, $160 or 32 cents per student for "music use." A university of 5,000 students pays 16 cents per student or a total of only $800.

GARY ENGLISH,
Executive Director, National Entertainment & Campus Activities Association.

NEW YORK, N.Y., *February 9, 1979.*

DEAR ADMINISTRATOR: The present Federal copyright law has now been in effect for more than a year. Under this law—and except for a few specified exemptions—your institution may not publicly perform a copyrighted work without consent. Performance without such consent may be considered an infringement and your institution may be subject to considerable financial damages under the law.

Broadcast Music, Inc. (BMI) represents more than 55,000 writers and publishers of music whose combined repetoire exceeds one million titles. Under the circumstances, if any music is publicly performed within your jurisdiction, a significant percentage is almost certainly licensed by BMI.

Since last March, BMI has made a number of attempts to conclude a license agreement with your institution. For whatever reason, we have, thus far, been unsuccessful. In order to protect the rights entrusted to us by our more than 55,000 affiliates, we feel that we no longer have any choice but to insist that you cease and desist from any further use of our music without our permission. Continued use after this notice may be considered as a willful infringement and we will be compelled to take whatever legal steps may be necessary to protect our rights.

We have, for your convenience, once again enclosed copies of the applicable College/University license form. If you have any questions regarding this agreement—or this letter—please feel free to contact me.

Very truly yours,

ALAN H. SMITH,
Vice President, Licensing.

Enclosures.

OFF-AIR TAPING: A TEACHER'S VIEW OF OBSERVATIONS AND IDEAS FOR SOLUTION OF THE PROBLEM

As an educator, how do you feel about making video tapes of commercial TV shows for use in your classroom? We are entering an exciting stage in regard to the new Copyright Law and the problem of off-air taping by the schools. On March 2, 1979 a meeting to discuss this issue was called by the House Committee on the Judiciary in Washington, D.C. Out of that meeting there seemed to emerge a new spirit of cooperation between users of copyrighted materials and copyright proprietors that may indicate resolution of the issue within a reasonable period of time. Will the voice of those who deal on a daily basis with our citizens of the future be fully heard? This question can only be answered by each individual who cares to respond.

Some observations in regard to off-air taping by educational institutions follow. Observation 1: Off-air taping by schools is a significant reality—that is why studies have shown that 95 percent of educational institutions having television equipment make off-air tapes. Another study showed 500,000 teachers and 11 million students involved in learning from off-air tapes. This is not a new phenomenon, it has been going on for more than 15 years. The earliest target market for Sony TV equipment (long before Betamax) that would record off-air was the schools. A major argument by attorneys for Sony in the Betamax trial was that there has been a highly substantial and unexplained delay in the taking of appropriate legal action by copyright proprietors. This has occurred while schools and others spent billions of dollars on equipment and tapes. At the same time, the networks themselves run ads for the Betamax.

Observation 2: A particularly distrubing thing as it relates to the off-air taping issue is the following list of some of the most frequently heard words and phrases. It goes something like this: networks, producers, film distributors, teachers, non-profit institutions, education. The most important word is almost always left off the list. The word is students: the basic human ingredient. There is an overriding and tremendous social need for our future citizens to be equipped with the best and fullest information society can provide. They will need it. Television programming has the potential to extend the classroom experience to an extraordinary degree. Instructors need the information available on TV to enhance the learning process—students must be sensitized to the information in advance, and both elements must be coordinated and presented at the correct instructional moment for a specific educational achievement to occur in the optimum way. As a teacher first and foremost, it is for many, very difficult to deny valuable educational experiences to students.

Observation 3: Involves another question, is off-air taping by individual teachers for face to face instruction legal or illegal? The primary reason for the present legislative activities in Washington and the court trials around the country is because this specific question cannot be answered and the parties to the debate cannot agree. Perhaps a combination of the decisions will provide us with a future course that is more definite.

Observation 4: What exactly constitutes Fair Use? This is the most frequently asked question and it is the hardest to answer. The new law spells out 4 criteria.[1] A specific problem that has troubled those having to deal with copyright application is: Must I adhere to all 4 criteria? or to half of the criteria? or to what? Attorneys, media people, teachers, and even judges disagree as to how the criteria should be applied to daily problems. Information from the Meeropol vs. Nizer Case can be of some help.

In that case, infringement was defined as:

"... those works which interfere unduly with the monopoly of the copyright holder without bringing a commensurate benefit to the public."

A fair use was defined as:

"... those works which interfere but slightly with the copyright monopoly while offering much to society."

A California copyright specialist, Arthur Stanley Katz has provided some other helpful advice: remember first and foremost, will your actions significantly reduce the profits of the copyright proprietor. To be responsible we must pay serious attention to this factor. We might however note that the monopoly of the copyright holder is not absolute when there is a legitimate fair use school application.

The second half of this work deals with solutions. Creative searching for responsible and appropriate solutions are the hope for the future.

For the last 2½ years the author has worked to the limit of his energy on the concept of allowing the creators of TV programs, a tax credit in return for the privilege of using shows to best educate our future citizens. The idea has been discussed with attorneys, judges, an ex-CBS executive, and a recognized tax law specialist. All have felt the idea has merit and have aided in refining the concept. The tax credit idea has been labeled the Public Service Concept. The public service concept would provide a more simple, workable solution to the off-air problem wherein each party (user sand producers) could benefit. Arrangement would be made at the time a network contracts with a producer concerning a program to be aired on a future date. Attorneys would have to work out how the money from the write off would be distributed among the various interests in that particular copyright (i.e. how much to the screen writer, the musicians, actors, etc.).

The tax law expert has indicated that the allowable write off to networks might be based on a figure such as 1-2 percent of the original cost of the program to the station, a percentage of the gross profits realized or on the actual cost of production involved with airing the particular show. Producers could be given a similar credit or could contract for payment from the network in return for public services rendered. The special tax credit would be allowed over and above presently allowable deductions (which range above the 70-percent level), against procuring a film for TV during the first year of usage. Programming such as game shows and soap operas might not be granted eligibility for the credit. Such a solution would be an improvement over the present situation, wherein many schools copy without authorization and networks/producers lose sales. A blanket amount to cover all instances and uses of television materials in schools would be granted within the 2-percent deduction or whatever amount was agreed upon. Programming would be allowed to circulate until its social value was negligible. Students in the Republic of Germany benefit to a great extent from an arrangement such as the public service concept. In the German system, a special tax is levied against video equipment when it is sold and then is applied to remuneration of copyright proprietors when programs are used as a public service. There are many who feel that our students should have equal benefits and access to the best educational experiences that we can offer. Access to educational information should be available regardless of the financial status enjoyed by the school a student attends. With tightening economic realities, there are many schools without budgets for even rental of educational films; others are very well off. Thus, the public service concept might create great advances in the equality of educational opportunity. It is realized that the public service concept might create the need for additional legislation but it seems it would provide greater uniform fairness, broader and easier access to materials, while at the same time giving larger and more dependable income to producers and copyright owners. Once enacted there would be no expense to government for enforcement.

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[1] The Four Criteria are as follows:

1. The purpose and character of the use.
2. The nature of the work.
3. The amount and substantiality of the portion used.
4. The effect of the copying on the potential market.

Enactment of the public service concept or some measure that would give all students in the United States, access to our best experiences would represent a tremendous contribution by the legislature to our citizens of tomorrow. Lastly, the public service idea would promote (perhaps more than any other solution) the use of TV at its best for application to learning in our schools and would coincide with already stated educational goals of governmental organizations such as Corporation for Public Broadcasting and Public Broadcasting Service.

A second solution idea: The off-air taping issue might be answered through Declaratory Relief Actions. This is a legal idea[2] and involves an entirely different viewpoint. The idea is that any school institution could bring what is known as a Declaratory Relief Action against a TV network. The purpose of a Declaratory Relief action is to clarify the legality of an act before it is done. The action would be filed prior to the airing of a particular show of great social value on a network system. In effect, the school institution would be asking the court to decide the legality of making an off-air tape before the program was shown. It is understood that such an action would be filed in a federal level court, and further, that such actions take high priority. The action would provide a specific legal precedent, and it would be promptly acted upon. It is recommended that if such an action were taken, it should be done by a small school district. That the act be requested by a single teacher for direct use in only his class. That no multiple copies be made, and that the program not be available for purchase. The result would be interesting!

The third thought: The education establishment should actively recruit support of its natural and politically potent ally: the equipment manufacturers. A noticeable and important occurence has been that the large companies such as Sony, RCA, Panasonic, etc. are almost never represented at meetings or in the literature in regard to off-air taping by schools. If schools are not allowed to make tapes or it becomes economically unfeasible to do so, then surely equipment manufacturers will lose sales/income. There might be a parallel decline in the market for blank and pre-recorded tapes. There is concern about loss of profits by copyright proprietors—there should be equal concern over those whose equipment makes off-air taping by schools possible.

The fourth thought regarding solution: That state, local, and professional organizations might develop policies, positions, and alternative solutions to the problem of off-air taping. Our state organization in California has developed and accepted such a statement responding to the needs expressed in our region. We feel that the policy represents a pioneering effort and it will bring public pressure from a slightly different angle and approach than has occurred elsewhere.

In conclusion it is felt that the legislative branch along with the copyright office of our government has had the greatest contact with the history and problems surrounding the entire off-air issue. What may be required is a series of amendments to the 1976 Law. Court cases are often too narrow in scope to deal with the gamut of problems being faced by all those having to deal on a daily

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[2] Credit for the Idea in regard to Declaratory Relief: Hon F. W. Troost, Judge of the Municipal Court, Culver City, CA.